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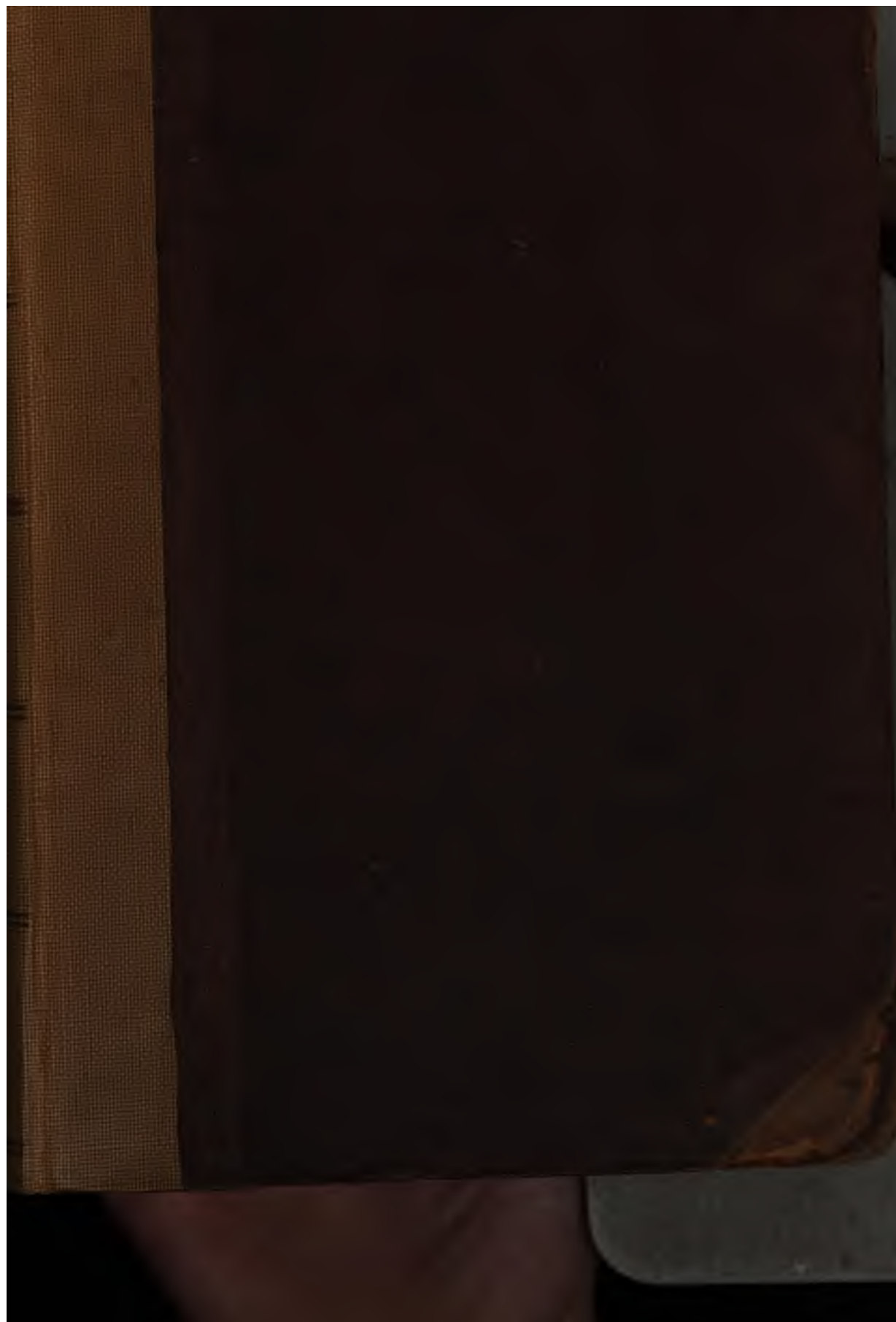
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Robert J. Whitwell.

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R E P O R T S
OF
CASES ADJUDGED
IN
The Court of King's Bench,
DURING
THE REIGNS OF
CHARLES THE SECOND; JAMES THE SECOND; AND WILLIAM THE THIRD.

BY
SIR BARTHOLOMEW SHOWER, Knt.

IN
TWO VOLUMES.

VOLUME THE FIRST:

CONTAINING,
CASES adjudged in the Court of King's Bench, in the Reign of WILLIAM THE THIRD:
With several learned Arguments—and with TWO TABLES; the First of the *Names of the Cases*;
the other of the *Principal Matters*.

THE SECOND EDITION,
CORRECTED,
WITH NOTES AND MARGINAL REFERENCES.

BY
THOMAS LEACH, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

London:

PRINTED FOR W. CLARKE AND SON, PORTUGAL-STREET,
LINCOLN'S-INN.

1794.



PREFACE

TO

THE PRESENT EDITION.

THE Reports of SIR BARTHOLOMEW SHOWER, like most other posthumous publications of the kind, were originally presented to the world in the disordered state in which they were found among his papers after his decease, and, of course, were less complete than they must have been if they had been prepared and polished for the press by the skilful hand of their learned and distinguished Author.

Their intrinsic and substantial merit, however, notwithstanding the imperfections incidental to this kind of publication, immediately established their authority; and, the demand for them continuing to increase in proportion as the copies became scarce, they have been for some time past, not only advanced in value to almost treble their original price, but were so extremely difficult to be procured, as to render a new edition necessary.

The attention of the Editor, in preparing the present Edition for the press, has been principally employed in correcting the *Text*, inserting *Marginal Abstracts*, adding *Marginal References*; amending the *Indexes*, and compiling the *Notes* which will be observed to accompany many of the Cases.

The TEXT of the former Edition is extremely loose in its stile, and sometimes obscure in its meaning; but although the Editor has occasionally endeavoured to rectify these imperfections, he has not ventured to make any alterations that could in the least degree change the sense of the Author. A variety of references also, frequently inserted in the middle of a sentence, and almost always in a wrong place, contributed to increase this obscurity; these references have been carefully examined; the *names of the Cases* inserted in the text; and *the Reporters*, in which the cases are to be found, named at the bottom of the page, except only where they appeared to have no relation to the subject, and in these instances they have been expunged. In the case of *Philips v. Bury*, a part only of one of the arguments was reported, without any statement of the facts, or any account of the ultimate opinion of the court: to remedy this defect, which rendered the report quite unintelligible, the Editor has taken the liberty to supply the other parts of the case from the Author's own report of it in his *Cases in Parliament*: in order, however, to render the Text as it stood in the original Edition discernible, the new matter is inclosed within [*books*].

To the Text thus altered, he has added, at the commencement of each Term, the names of the Judges who then filled the Court, and also the names of the Attorney and Solicitor General.

The MARGINAL ABSTRACTS of the former Edition, merely described the kind of action in which the question in each case arose. In the present Edition, the Editor has endeavoured to give abstracts or epitomies of the precise *points* which were in litigation; and, he trusts, that they will, in general, be found accurate.

The MARGINAL REFERENCES in the former Edition were very few indeed, and most of them incorrect; those which on examination were found to have relation to the subjects of the case are retained, and those which appeared irrelevant expunged: to these have been added, references to the *same case* in contemporary books, and to such other *identical or analogous* points of Law as the Editor was able to find in the more ancient as well as modern Reporters.

The NOTES are now first added, there being none to the former Edition, and are used to explain such variations as appeared to be material between the report of the principal case and the statement of it by contemporary reporters; to shew, whenever the opportunity occurred, the ultimate decision of the Court upon the subject; and to point out the confirmation or alteration which the law of each case has received or undergone, either by subsequent acts of the legislature, or by decisions of the courts.

The

The INDEX to the first volume has been amended, and that to the second volume made entirely new.

The Editor submits the result of his labours to the opinion of the profession : he has endeavoured to collect his materials with industry, and to use them with judgment; to amend what was corrupt, and to explain what was obscure ; but he is fearful of entertaining the flattering hope that his industry has been able to reach the perfection which it was his endeavour to attain.

Easter Term, 1794.

TO

TO THE
R E A D E R.

THE AUTHOR of the following REPORTS acquired such eminency in his profession, as sufficiently recommends them to the Public; they being left under his *own hand* with a design to communicate them to the world.

This, without question, will make them acceptable to the present Gentlemen of THE ROBE, and profitable to those who shall hereafter study the *Common-Law*; which makes it unnecessary to say more concerning the work itself, or the author of it, though there is justice in distinguishing the dead as well as the living.

The design of this PREFACE is not to enter into the history of the author's family or education, though both might be mentioned to his advantage, but to give some sketches of his personal character.

His vivacity of parts, and felicity of expression, soon distinguished and led him betimes into a crowd of business; and, at an uncommon age, brought him to stand before the most august assemblies of the nation, where he acquitted himself with satisfaction to others, as well as to his own honour.

His

His native city of EXETER shewed him such a distinguishing respect, as to chuse him to be their representative in two parliaments, and they also had returned him to serve in a third, while he was confined by that sickness which ended in death, in the forty-third year of his age.

I must not omit to mention his GENEROSITY, which makes so beautiful a part of a good character. This was so free and impartial, without regard to parties and denominations, that indigence and worth always found A PATRON in him, in which he gratified himself at the same time that he relieved the objects of his charity; and, that his kindness might be better esteemed by the receivers, he was wont to give them some opportunity of service, that it might appear an act of *justice* rather than of *compassion*; and this way he covered their modesty at the same time he helped their necessity.

As to his RELIGION, it was that of THE CHURCH OF ENGLAND established by law; not was he only satisfied in relation to its government, discipline, and doctrines, but those who were intimately acquainted with him knew he defended them, as he likewise did our civil constitution.

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Easter Term,
The First of William and Mary,
IN
THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.
Sir WILLIAM GREGORY, Knt. } *Justices.*
Sir GILES EYRES, Knt.

Sir GEORGE TREBY, Knt. Attorney General.

JOHN SOMERS, Esq. Solicitor General.

Fitzpatrick against Robinson.

Case 1.

Michaelmas Term, Jac. 2. Roll. 105.

BOND for performance of covenants; which were for *7. S.* to render a true and just account, and to pay what should, &c. The Defendant pleaded *performance* generally. The Plaintiff replies, That he did not give a true and just account, &c. The Defendant demurs generally.

Mr. GIRDLER for the Defendant urged, That this was not a good breach, because "just and true account" implies that there was an account, and this is therefore a perplexed and multifarious issue: he ought to have said, either that he gave no account at all, or that he gave an account, but not a just and true one, and have shewn wherein it was otherwise, so as the Defendant might know what answer to make.—*Adjournatur.*

Afterwards THE PLEA was held ill, because for the act of a stranger, and then you must shew how: but this is not helped by the replication, as plea of performance general to negative covenants may be. See the case of *Agar v. Reeves, Yelv. 39, 40.* Judgment for the Plaintiff. *Quære de eo per Replicat. Vide 2 Rich. 3. pl. 17. Styles 473, 474.*

Moor. 856. 5 Com. Dig. "Pleader." (E. 16.) (C. 25.) (2 v. 13.) And see the case of *Sayre v. Minns, Cowp. 575.*

In debt on bond for performance of a covenant, that a third person shall render a true and just account, A PLEA of performance generally is bad; and not aided by A REPLICATION that he did not give a just and true account. S. C. Comb. 107. S. C. Holt. 540. Co. Lit. 303. Cro. Eliz. 749, 232. 1 Lev. 303. 2 Saund. 411. Dyer. 373. Hob. 13.

Case 2.

Browne *against* Browne.

A sister of the half-blood shall have equal distribution with one of the whole-blood.

S. C. Carth. 51.
1 Mod. 209.
2 Mod. 204.
1 Vern. 403, 437.
1 Vern. 403.
2 Vern. 124.
1 Peer Wms. 25: 53.
2 Peer Wms. 344: 440.
3 Peer Wms 50.
102. 125. 194.

* [2]

MOTION for a prohibition to a suit in the Court Christian by a sister of the half-blood, to have distribution as next of kin.

Mr. DOBBINS urged, That the case in *Brook's Abridgement* had been exploded and denied.

But it was answered, That this was *quieta movere*, for this had been settled, in the case of *Perkins v. Story*, and held that they were in equal degree* for administration. So in *Smith v. Tracey*. 1 Mod. 209. and *Browne v. Wood*, *Allen* 36. There is the same nearness of blood; there is no difference in degree.

And a prohibition was denied **PER TOTAM CURIAM** on debate. (a)

Showers Parl. Cas. 108. 3 Wils. 379.

(a) Formerly those of the half-blood were allowed only a half share. *Ld. Winchester v. Norcliff*, Trinity Term, 2 Jac. 2. but in the case of *Smith v. Stacy*, Hilary Term 27 & 28 Car. 2. 1 Mod. 209. 2 Mod. 205. 206. the Court thought that

the half-blood should be allowed an equal share with those of the whole blood; and the point was at length so settled in the case of *Crooke v. Wake*, upon appeal to the House of Lords. 1 Vern. 404. 437.

Case 3.

Browne *against* Shore.

The 22 & 23 Car. 2. c. 10. vests an intestate's effects in those who are intitled to distribution at the time of his death.

S. C. Post. 25.
S. C. Holt. 258.
S. C. Comb. 112.

MOTION for a prohibition, on this suggestion, That the administrator, of one dying intestate before distribution, sued for that parties share, and that no right was vested, but only a power and direction to the ordinary to distribute; and consequently it must be to the next of kin at the time of the decease, and not at the time of the distribution.—THE COURT inclined that it was a right vested; but to settle the point, they directed them to *declare*, and the other to *demur*; and accordingly they did. (a)

2 Mod. 204. 3 Mod. 59. 65. 1 Vern. 403. Carth. 51. 1 Com. Dig. 262.

(a) The Court were of opinion, that the statute gives an immediate interest in the effects of the intestate to those of his kindred, who are intitled to distribution at the

time of his death, and awarded a *consultation*. S. C. Post. 25. See also 1 Peer Wms. 46. 2 Peer Wms. 441.

Case 4.

Thompson *against* Harvey.

Trinity Term, Jac. 2. Roll. 192.

A bond with condition not to buy sheeps feet of any others but such and such, &c. and not to buy above such a quantity, &c. The Defendant pleads, That that was his trade; and that the bond was procured from him to restrain the use of his trade, and therefore is of no force, but void in law. The Plaintiff replies, That it was voluntarily given. The Defendant demurs.

DEBT upon an obligation, with condition not to buy sheeps feet, &c. of any others but such and such, &c. and not to buy above such a quantity, &c. The Defendant pleads, That that was his trade; and that the bond was procured from him to restrain the use of his trade, and therefore is of no force, but void in law. The Plaintiff replies, That it was voluntarily given. The Defendant demurs.

S. C. Comb. 121. S. C. Holt. 674. Co. Lit. 223. 11 Co. 53. Cro. Eliz. 872. Cro. Jac. 596. 3 Lev. 243. 1 Bac. Abr. 410. 2 Bl. Rep. 1109. Stra. 739. 741. *Ld. Ray*. 1456. *Annally's Rep*. 53. 2 Peer Wms. 181. 192. 1 Brown's Ch. Rep. 341. 4 Bur. 2225.

ARGUED

ARGUED for the Plaintiff, That it was a good condition; that dressing of sheeps feet was not such a trade as the law regards, and the naming it so will not make it otherwise than in reality it is; and admitting it a trade, yet the restraint is lawful, being only a particular special restraint, and not universal and general, as is the case of *Brode v. Jolliff*. (a)

THOMPSON
v.
HARVEY.

On the other side it was urged by Mr. SERJEANT, That the bond is void, because the condition is against law, *Co. Lit.* 56. It is an universal restraint; for we must not buy of any a greater number than he does, so that if he leave off his trade, we must leave off ours; or if he buy none, we must not. We have averred that the bond was given upon an unlawful condition, and that will make it void, as in the case of simony, *Moore*, 641. *Cro. Car.* 180. *Cro. Jac.* 248. *March* 158.

To this THE COURT answered, That these are all void by act of parliament, and that there was a difference between bonds void by Statute, and * those which are void at *Common-Law* because of the unlawfulness of the condition; (b) as a bond not to prosecute a felon, 1 *Leon.* 203. The averment may be good however, if it be consistent with the condition: (c) but this is plainly restrictive of trade, because he is not to deal with any person whatsoever that the Plaintiff hath dealt withal; and there is no difference between a restraint from a particular place and from particular persons; and in the Company of the Taylors of *Exeter's case*, (d) in the Exchequer Chamber, it was held that a restraint from any particular place was unlawful.

* [3]

But DOLBIN Justice held strongly, That a bond not to trade in a dale is good; and that he always took the case of *Jolliff v. Brode* to be good law.

At last THEY ALL AGREED this was ill; and gave rule for a judgment for the Defendant nisi.

(a) 2 Roll. Rep. 201. Noy. 98. Cro. Jac. 596.
(b) Whelpdale's case, 5 Co. 119. 2 Roll. Abr. 709.
(c) Bro. "non est factum," 14.
(d) 2 Show. 345. Cro. Jac. 596.
1 Jones 13. March 77.

Strode against Osborne.

Case 5.

Easter Term, Jac. 2. Roll 297.

ERROR on a judgment in the Common Pleas in a writ of waste.

FIRST Exception taken because the Jury had not *the view*; but **PER CURIAM** it need not appear on record that they had *the view*; as was resolved in the case of *Cole v. Green*, 1 *Lev.* 309, 2 *Saund.* 252.

In waste, it is not necessary to appear on record that the jury had *the view*.
S. C. Post. 26.
S. C. Comb. 113.
S. C. Holt. 268.
Winch. Ent. 1039.

SECOND OBJECTION. It is necessary there should be an award that they have the view, or somewhat to warrant it; the judgment is without *per visum Jurator*. THE COURT. The precedents are sometimes without these words "*per visum*." The Defendant is not to de-

The judgment on a writ of waste need not say *per visum Juratorum*.

Barnes, 469. 2 Saund. 254. Hutt. 8. Hob. 179. 203. 226.

STROBE
v.
OSBORNE.

mand the view, as in a writ of entry; for it is there for the tenant himself to have the view; here the Jury are to have it by the statute, and no need to mention the view; judgment well enough without it. *Vide Raft. Entr.* 696.

Qs. If variance between a writ of waste and the verdict, in the number of acres, is fatal
Cowp. 766. Dougl. 642. 1 Term Rep. 236.

A writ of error variant in its direction from the record is bad. S. C. Post.

ANOTHER EXCEPTION, because the writ is for cutting of forty trees growing *sparsim* in forty acres, but the jury find that he cut down forty trees in *twenty* acres: if this be a good finding? *Quære*, If assignable for error, because it is a thing for the Defendant's advantage?

BUT the writ of error was quashed, because it was directed to *Sir Edward Herbert* as *coram ipso et sociis suis*, but the record removed was before *Bedingfield*.

26. and S. C. cited in *Fowler v. Bridges*, Post. 186. 1 Term Rep. 240.

* [4]

Cafe 6.

Plea begins in *bar*, and concludes in *abatement*.

Moor. 30.
Cro. Eliz. 203.
Latch. 178.

1 Lev. 312. 1 Vent. 136. 5 Mod. 132. 144. 6 Mod. 103. 1 Salk. 297. Post. 334. Comb. 483. Lutw. 34. 2 Ld. Ray. 1018. 4 Bac. Abr. 50.

* Carneth against Prior.

Easter Term, Jac. 2. Roll 74.

UPON debate of this case (which I little heeded, &c.) HOLT Chief-Justice took this difference upon 33 Hen. 6. 18. that a plea which concludes in *abatement*, though it begins in *bar*, is a plea in *abatement*; and that, *è contra*, a plea concluding in *bar*, though it begins in *abatement*, is a plea in *bar*. *Quod non fuit negat'*.

Cafe 7.

Barker against Beardwell.

The assignee of a London apprentice though turned over pursuant to the custom cannot maintain covenant on the indenture.

March. 419.
Cro. Eliz. 437.
5 Co. 17. 2.
Co. Lit. 385.
Espinas Dig. 354.

COVENANT, brought by the Plaintiff, upon an indenture of apprenticeship made by the Defendant to J. S. in London, which was inrolled there, and the Defendant turned over to the Plaintiff before THE CHAMBERLAIN, &c.

There was a demurrer to the declaration, and judgment for the Defendant, because custom cannot make an assignee, so as to entitle him to an action.

THE COURT. Where there is a custom of a place that creates a duty, an action lies in the King's courts, because there is a duty vested; but here is no duty vested, and you must make yourselves privy to the contract, for to found an action. An action for calling a woman "whore" will not lie here, though it will in London.

JUDGMENT for the Defendant.

Cafe 8.

Cramlington against Evans.

Easter Term, 2 Jac. 2. Roll. 192.

If a bill of exchange payable to A. to the use of B. be assigned by A. by indorsement to another; it cannot be extended for a debt due to the king by B. S. C. 2 Show. 509. S. C. 2 Vent. 307. S. C. Carth. 5. S. C. Skin. 264. S. C. Holt. 108. — Kyd. on Bills, 69. 4 Com. Dig. 244. 3 Bac. Abr. 609.

DEFENDANT draws a bill of exchange payable to one Price to the use of one Calvert. Price assigns, by indorsement, the bill to the Plaintiff, who brings the action as indorsee. The Defendant pleads that Calvert was indebted to the king, and that there-

upon

upon *an extent* had been sued, and this money paid. The Plaintiff demurs.

CRAMLING-
TON
v.
EVANS.

SIR ROBERT SAWYER argued for the Defendant, That here is no legal interest in this bill, but the money is and belongs to *Calvert*. The bare delivery of goods and chattels upon a confidence, is not a trust, but the property remains in *cestuy que use*; and he cited *Shaw v. Horewood*, *Yelv.* 23. *Harris v. Beaver*, *Cre. Jac.* 678. Where goods; or money, or other personal things, are delivered to another, they give no property, unless it be to his use; so if it be expressly to the use of the deliverer, or a stranger, * *Dyer* 20, 21. If *Price* had received the money, *Calvert* might have had an action of debt against him for it, 36 *Hen.* 6. *pl.* 9. And if this be so, how can these assignees come to an interest? And to lay a custom, that a man shall come to a property in that which he knows and sees plainly is mine without my direction, shall never help it, 33 *Hen.* 6. *pl.* 5. 3 *Co.* 78. The custom of merchants assigns a *chose in action*, but it is from him that hath the property; but the going to the first drawer is not by the custom of merchants, but by the common law, by reason of the "value received." It cannot be said to be paid in his own wrong, because he that recovers hath as much right to sue as the other, and both may. Now here is *an extent*, whereby this very debt is extended, as well against *Cramlington* as the others, and the money actually paid, for so it is pleaded: This extent is a suit in *Calvert's* name, whose money it was, for ~~the~~ *extent* is his, and he recovers; then here is a recovery before the other suit, which shews that it doth not amount to the general issue, but is a subsequent bar.

* [5]

THOMPSON *è contra*, for the Plaintiff. The privity of contract is between the drawer, and *Price*, and the indorsee. The last indorsee hath an action against any of the indorsers, or against the original drawer; and therefore this can be no good plea. Besides, this plea goes only to the consideration, and answers nothing to the *assumpsit*; here is a right vested in the Plaintiff by the indorsement and assignment ten days before the *extent*.

2 Show. 441.
3 Mod. 86.
Kyd on Bills of
Exchange, 72.

HOLT Chief Justice. An universal custom is a law, and I know no distinction between *lex mercatoria*, and *consuetudo mercatorum*: If the drawer mention it "*for value received*," then he is chargeable at common-law; but if no such mention, then you must come upon the custom of merchants only. This is a bill which is assignable by *Price*, and, when *Price* assigned it, he received the money, and that receipt was for the use of *Calvert*, and there *Calvert* hath his action; but we can take notice of none but *Price*; and at this rate the credit of bills of exchange will be spoiled.

PER TOTAM CURIAM. Judgment for the Plaintiff,

• [6]

• Beake *against* Tyrrell.

Cafe 9.

Hilary Term, 3 & 4 Jac. 2. Roll. 334. or 173.

To trespass for taking a ship, *A PRIZE* that the Defendant was the captain of a man of war, and that he took her on the high seas as a prize, and carried her into a port abroad, where she was condemned in the Admiralty Court as prize, is no justification; for it does not appear that she was lawful prize; or before whose Court, or by what Judge she was condemned.

S. C. Carth. 1.
S. C. Comb. 120.
S. C. 3 Mod. 194.
S. C. Bro. Ent. 69.
S. C. Holt, 47.
Post. 135, 143.
Ray. 473.
Skin. 59.
1 Salk. 32.
Carth. 32.
1 Vern. 21.
Bull. N. P. 245.
Doug. 594.

(a) See 4 Term Rep. 366. and Cases in Crown Law 278, notes.

TRESPASS for taking a ship, &c. The Defendant pleads, That he was a captain of a man of war, and that he took her on the high-seas as a prize, and carried her to and there prosecuted her and condemned her in the Admiralty Court as a prize, &c. Demurrer.

Argued in maintenance of the plea, That credit is to be given to the Admiralty's proceedings, and that the sentence and condemnation there is a good bar, and after the matter hath been there examined, this Court must take it for just proceedings; that the cause of the sentence is not traversable, but only whether there were such proceedings there or no, 8 Co. 68. The court and jurisdiction of the Admiralty reaches over the sea all the world over, and they may sit at land any where, in the *East-Indies* as well as here; and in 29 Car. 2. in *Hutchinson's Case*, (a) who was accused and acquitted in *Spain* for killing a man there, it was held to be a good bar to any proceedings here; and the case of *Hughes v. Cornelius*, (b) and *Cottingham's Case*, (c) depended on a sentence in *Italy*.

E contra, urged, That "*ut prizam cepit*" is uncertain, and no averment that it was a prize: He was a captain of a man of war, but shews not any commission, or *quo modo* he was such. If a man be to plead proceedings in an inferiour court, he must shew so much as to evince that they had a consufance of the cause: He only says, That being upon the high sea, he took her as a prize; he doth not say that the suit in the Admiralty was upon our instance: If it had, if we had complained there of this unjust taking, and sentence had been against us, it would have been stronger on their side; but they only say that they took it, and carried it in, and prosecuted and condemned it.

HOLT Chief Justice, That he was a captain is well enough, he need not shew his commission (a). But it doth not appear how this ship came to be a prize; it doth not appear there was any cause to seize her as such, nor shewn that there was any war: the subsequent going to the Admiralty cannot justify the first illegal caption; besides, it is not shewn whose court of Admiralty it was, nor before what Judge.

Judgment for the Plaintiff PER TOTUM LE COURT.

NOTE. This was an interloper seized by the *East India Company*, and carried into the *Indies*, and there condemned by the Company's Admiral, &c.

(a) 3 Keb. 785. 2 Show. 232. 3 Mod. 194. See also Bull N. B. 5th edit. 245. and Roche's case, Cases in Crown Law, 125.

(b) Raym. 473. Skin. 59. 2 Show. 232. 2 Ld. Ray. 893. 935.
(c) 2 Roll. Abr. 83. Cro. Car. 506.

Hutton

* Hutton *against* Goodrick.

Hilary Term, 3 & 4 Jac. 2. Roll. 334.

EJECTMENT, on three several demises, in an inferior court; and for the second doth not say it was *infra jurisdictionem curiæ*, only *infra libertat' et jur'* and doth not say *præd'*. If good? There was cited *Cro. Eliz. 441. Gooday v. Mitchell*, and *Quales v. Searl, Cro. Jac. 95.*

SECONDLY, Besides, the judgment was, *quod recuperet terminum suum*, whereas there were three severals. There was cited the case of *Pattison v. Goddard*, in Michaelmas term, 3 Jac. 2. Roll. 110. *Adjournatur.*

* [7]

Case 10.

Ejectment in an inferior Court must allege the demise *infra jurisdictionem curiæ*. Post. 61.

Cowper 18, and Trevor v. Wall, 1 Term Rep. 151.

In ejectment on three demises, *Q. if judgment to recover his term, be good.*

Pepis *against* Low.

Michaelmas Term, 4 Jac. 2. Roll. 540.

ACTION on the case by assignees of commissioners of bankrupt. AN EXCEPTION was taken to the declaration, because it alleged J. S. to be a bankrupt, and doth not shew how. *Quære*, If good? (a)

Carth. 29. Bull. N. P. 37. Cowp. 569. Dougl. 205. Cooke's B. L. 570.

(a) In S. C. Carth. 29. it is said that the declaration was held good, and judgment, on demurrer, given for the Plaintiff.

Case 11.

A declaration by assignees need not state how the party became bankrupt. See *quære*. Lutw. 451, 277. S. C. 451, 277.

Villers *against* Ball and others.

Easter Term, 1 Will. and Mary. Roll. 410.

CASE for stopping of lights; and says only, *quod possessionat'* of such an house, in which he had and *habere debuit* such and such lights.

On demurrer, exception was taken, because it did not say *time out of mind*; nor so much as that it was an *ancient house*, and that the lights were *ancient*:

But held well enough upon the case of *Sands v. Trefuse, Cro. Car. 575. (a)*

Com. Dig. "Pleader," c. 39. 1 Ld. Ray 392. 2 Ld. Ray, 1538.

(a) If lights be stopped by the erection of buildings on a man's own soil against the windows of another, it must be averred they were *ancient*; for otherwise he has a right to build upon his own soil, *Cro. Elis. 118. 1 Lev. 122. 1 Vent. 239. 6 Mod. 216. 20 Viner 8. & Ld.*

Ray. 1093; but as against a *wrong doer* stating a bare *possession* is sufficient. 1 Vent. 237. 3 Keb. 133. 20 Viner 11. 1 Ld. Ray. 392. But see the case of *Rider v. Smith, Trinity, 30 Geo. 3. 3 Term Rep. 766*; and *Clarke v. King, 3 Term. Rep. 147.*

An action for stopping lights good without alleging the house or lights ancient.

Post. 18. 3 Keb. 133. 1 Leon. 173. 1 Vent. 237, 239.

Case 13.

Lapdall *against* Hart.

Trinity Term, Jac. 2. Roll. 953.

An *assumpsit*,
omitting the De-
fendant's name.
Qs. If aided by
a verdict.

Cro. Eliz. 778.
Cro. Jac. 586.
Cro. Car. 593.
Dougl. 114, 683.
4 Term Rep. 360.

CASE on a promise. After verdict, it was urged that it was *super se assumpsit*, and doth not say who; and there was cited the case of *Oxford v. Rivet*. Cro. Car. 79, 93: In *scire facias* against an administrator; Plea, That she was only administrator *durante minore etate*, and had fully administered; Replication, *quod devastavit*, and issue thereon, and found for the Plaintiff: and held that no issue was joined; and ill in * the replication, not saying who did waste. *Adjournatur*.

* [8]

Case 14.

Evans and others *against* Pettifer.

Michaelmas Term, Jac. 2. Roll. 328.

Bail and Princi-
pal cannot join
in a writ of error.
S.C. Comb. 108.
Cro. Car. 481.

WRIT OF ERROR by principal and bail, held ill, and that they cannot join, according to the case of *Forest v. Sandland*, Hobart 72.

Case 15.

Mastin *against* Abdec.

Michaelmas, 3 Jac. 2. Roll. 575.

Where the
principal and
interest is in
hazard there can
be no usury.
S.C. Comb. 125.
S. C. Carth. 67.
S. C. Holt. 738.
S.C. 3 Salk. 390.

IT was agreed, That if principal and interest be in hazard upon a contingency, it is no usury, though the interest do exceed the allowed rates of six pounds *per cent.* according to the case of *Shapley v. Hurrell*, Cro. Jac. 209. *Vide* Cro. Jac. 508. and Cro. Eliz. 643. And when there is a hazard that the Plaintiff may have less than his principal, it is no usury.

Cro. Jac. 208. 509. 2 Roll. 48. 1 Lev. 54. 1 Sid. 27. Cro. Eliz. 741. 1 Atk. 340. 2 Black. 862. Cowp. 770, 794. 1 Hawk. P. C. ch. 82. l. 16. 3 Term Rep. 531.

Case 16.

Spencer *against* Durant.

Several actions
will not lie on a
joint and several
bond.

S.C. Comb. 115.
2 Leon. 27.
Jenk. 262.
Cro. Eliz. 202.

DEBT, in the declaration upon it, after *Oyer*, it appeared to be a covenant with the Plaintiff and another, "*et omnibus et cuilibet eorum obligat*" in twenty pounds for performance. Demurrer. *PER CURIAM*, It appearing to be a joint interest, each cannot bring a separate action. *Vide* Hob. 172. and the case of *Slingsby v. Beckwith*, 5 Co. 18.

5 Co. 22. Skin. 401. 1 Leon. 161. 1 Saund. 155. Moor. 849. Stra. 553. 1 Bac. Abr. 532. 2 Term Rep. 282. and the case of *Byers v. Doherty*, H. Bl. Rep. 236.

Michaelmas Term,
The Fourth of James the Second,
I N
THE EXCHEQUER CHAMBER.

THE KING'S BENCH.		COMMON PLEAS.	
Sir ROBERT WRIGHT, <i>Knt. Chief Justice.</i>	} <i>Justices.</i>	Sir EDWARD HERBERT, <i>Knt. Chief Justice.</i>	} <i>Justices.</i>
Sir JOHN POWELL, <i>Knt.</i>		Sir THOMAS JENNER, <i>Knt.</i>	
Sir ROBERT BALDOCK, <i>Knt.</i>		Sir THOMAS POWELL, <i>Knt.</i>	
Sir THOMAS STRINGER, <i>Knt.</i>		* * * * *	

EXCHEQUER.

Sir EDWARD ATKINS, *Knt. Chief Baron.*
CHRISTOPHER MITTON, *Esq.*
CHARLES INGLEBY, *Esq.* } *Barons.*
JOHN ROTHERAM, *Esq.*

Sir THOMAS POWIS, *Knt. Attorney General.*
Sir WILLIAM WILLIAMS, *Knt. Solicitor General.*

Piltarfe against Darby.

Michaelmas Term, 1 Jac. 2 Roll. 424.

Case 17.

ERROR on a judgment in debt in the King's Bench. The declaration was in debt on a specialty, whereby it is recited that *Piltarfe* was to go beyond seas, and transact the Defendant's business there, he covenanted to pay him for seven years the sum of one hundred pounds *per * annum* quarterly, to begin at doe and ending, is naught. S. C. 1 Lutw. 457. S. C. N. Lut. 136. S. C. Comb. 57. Cro. Eliz. 262. 702. Cro. Jac. 668. Cro. Car. 137. 2 Vent. 129. 2 Lev. 4. 3 Mod. 70. 1 Salk. 139. 141. 5 Com. Dig. "Pleader" (2. W. 14.). Debt, on covenant to pay so much quarterly, for four quarterly payments arrear, without saying when
* [9]
Christmas

PILTARFE
v.
DARBY.

Christmas 35 Car. 2 ; That on such a day one hundred pounds, for four quarterly payments, were arrear and unpaid, and yet unpaid, *per quod actio accrevit*, &c. Judgment upon *non sum informatus*.

Upon error, in the Exchequer Chamber, it was urged to be ill, because did not say "then ended," and it did not appear for what time it was arrear.

I ARGUED, That it was well enough ; that "then ended" was needless according to the case of *Taylor v. Guy*. *Sid.* 409. (a) ASSUMPSIT to pay eight pounds *per annum* to a vicar, and to begin on the 30th of *May*, and shews a breach for two years ended the last day of *May*, which is two years and a day ; yet on demurrer held good, because the word "*finis*" was surplusage, and then "for two years" was well enough. And the case of *Underbill v. Devereux*, 2 *Saund.* 71, 72. *A Scire Facias* to have lands re-delivered which were seized on an *elegit*, supposing a satisfaction ; the Defendant pleads in bar, *quod per magnum tempus*, SCILICET *per duos annos post deliberat* the Plaintiff *de injuria sua* held him out, and received the profits. SERJEANT POWIS demurs, because not said *prox' post*, nor which two years, and it might be after the Plaintiff's writ purchased ; but held good, and that it should be intended *secundum subjectam materiam*, *viz.* *prox' post*. So here it cannot be intended otherwise than *adtunc finis*. If we should bring another action they may plead this recovery, with an averment that it was the same : but besides, it must be supposed the two last years.

But five of six of the JUSTICES and BARONS then present held it uncertain and ill ; for that an avowry for rent is no estoppel to demand arrears before, according to the case of *Palmer v. Stabick*, *Sid.* 44. (b)

(b) S. C. 1 Lev.
43.
Raym. 21.
1 Keb. 91, 113.

And so judgment was reversed.

Easter Term,
The First of William and Mary,
IN
THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

JOHN SOMERS, Esq. Solicitor General.

Clerk, Knt. against Andrews.

Case 18.

PROHIBITION moved for, on suggestion that by our law no person is to be impleaded in an inferior court, but for such matter as is acted, arisen, and accrued within the jurisdiction of the Court; That one *Moore* at *Westminster* in the county of *Middlesex*, out of the jurisdiction of the Court of the POULTRY-COMPTER, *coram*, &c. became indebted to *Sir Robert Clerk* in seven hundred pounds; that *Andrews* intending, &c. had levied a plaint there against *Sir Robert Clerk*; that a summons issued, and *nihil habuit* returned, *secundum consuetud'*; but that *Moore* having a thousand pounds in his hands of *Sir Robert Clerk's*, was attached by the said thousand pounds; *Ita quod* of *Sir Robert*, *et esset* at the next Court, *ad respondend' secund' consuetud'*; whereas * in truth the said *Moore* was never indebted to the said *Sir Robert Clerk* *infra Jur' Cur. præd'*, nor ever became indebted to him in any sum but the said seven hundred pounds at *Westminster*, *et non alibi*.

The Court will not grant a *prohibition* to an inferior Court on a suggestion that the matter is out of their jurisdiction, unless a plea be pleaded to their jurisdiction before imparlance, and refused.

S. C. Comb.

109.

S. C. Carth. 25.

Post. 161. 173.

2 Inst. 602.

2 Roll. Abr. 318.

1 Sid. 65. 166

Godb. 164. 2 Lev. 230. 12 Mod. 135. 2 Mod. 131. 1 Vent. 88. Salk. 548. 4 Bac. Abr. 255. Stra. 879. B. R. H. 117. 2 Ld. Ray. 1408. 1 Peer Wms. 43. 476. Cowp. 20. 166. Dougl. 378. 1 Term Rep. 552. 3 Term Rep. 325. 4 Term Rep. 351.

* [10]

CLERK
v
ANDREWS.

(a) S.C. 1 Vent.
88.
2 Keb. 673.
But see the Case
of *Coxe v. St.*
Albans.
1 Mod. 81.
1 Vent. 120,
333.

(i) S.C. Latch.
126.

* [11]

(c) Moor 762.

(d) Moor 918.

Upon this suggestion I MOVED for a *prohibition*; for that we had pleaded this matter there, and the plea was refused, and we had affidavit thereof. I urged, that a prohibition lies to an inferior Court for holding plea of a cause out of their jurisdiction; there is the Writ in THE REGISTER 98. founded on the statute Westminster the first, cap. 35. which is commented on 2 *Injl.* 229. In the case of *Smith v. Bond*, in Hilary Term 17 Car. 2. B. R. Roll. 501. a prohibition to *Marlborough*, on a suggestion that it arose out of the jurisdiction, and affidavit that it did so, even without the necessity of pleading it there; and in the case of *Wayman v. Smith*, *Sid.* 464. and 1 *Mod.* 63, 64. (a) to *Bristol*, upon this suggestion, upon SIR FRANCIS WINNINGTON's motion. If an action be brought, and a judgment there be pleaded, they must aver the cause to have arisen within their jurisdiction; and it is the province of this Court to restrain all inferior Courts within their proper and respective jurisdictions. This case is not different from another common case; for the suit against *Morre* is as a new action in nature of a new plaint; and that appears from the very form of pleading a *foreign attachment*, and from thence we must learn it, since they keep no formal records, till made up upon occasion. In the entry there is a suggestion that there is so much in his hands, a process against him, and day is given him; he comes in and pleads, and all this like a new process. The mischief of inroaching jurisdictions, deceiving, and disinheriting the King's Courts is as great in this as in the other original suit. Supposing it only a mean to make the original debtor to appear and put in bail, that will not alter the case; for if any Court Christian, Admiralty, or other inferior Court, do meddle with any thing collaterally that is out of their jurisdiction, this Court will and ought to prohibit them: as, if a suit be by a Parson for tithes, and the Defendant plead that the place WHERE is in another parish, prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognisance, and this comes in obliquely. If a man be admitted, instituted, and inducted, and a suit is there for to avoid the institution, supposing it not valid, though the thing be of their cognisance, yet because the induction, which is temporal, and gives a lay-right, may depend upon it, a prohibition lies, *Sir Timothy Hutton's case*, *Hob.* 15. (b) If a man sue there to prove a nuncupative will, though that be of their cognisance, and of none other, yet if such will revoke a will in writing concerning land, a prohibition lies, Easter Term 14 Jac. *Reynolds's case*. (c) In *Roll. abr. tit. "Prohibition,"* 285. Though the *subjectum circa quod* be spiritual, yet if the consequence be a determination of a thing belonging to common law cognisance, this Court will prohibit; *pari ratione* in this case. As to the Admiralty-Court, it is the same: though things done on the high sea belong to their jurisdiction, yet if the consequence be a determination of a thing not belonging to their cognisance, a prohibition lies, as in *Bridgman's case*, *Hob.* 12. (d) If a man make an obligation upon the high sea for the security of a debt growing due before at land, or should make a promise to pay the same, this cannot be sued in the Admiralty; and so it is *à contra*, *Hob.* 79, 212. they cannot hold plea of an agreement at sea, and put in writing under seal at land. A similar case is that of an entire contract

contract for above forty shillings, and severed into divers small sums, and sued for as such in an inferiour Court, a prohibition lies, because it is to defraud and deceive the King's Courts, 19 *Hen. 6. pl. 54. Girling v. Aldas*: Easter Term, 22 Car. 2. in the King's Bench, 2 *Keble* 617. (a) There is no objection against this, but may be against all prohibitions to inferiour courts; for the debt follows the person in the other case as well as in this. The common law courts shall draw the whole, if part be within and part without a particular inferiour jurisdiction. As to *Turbill's case*, there is a great difference between that and this; for there jurisdiction was undoubted; (b) *Mr. Turbill* received the money there, and that was only a dispute of privilege, and yet in point of privilege it was contrary to two express resolutions in the very point; as *Lodge's case*, 2 *Leon.* 156. (c) and *Edward v. Tetbury*, 1 *Leon.* 189: And my LORD SAUNDERS, 1 *Saund.* 67. thought it an hard judgment. As to the customariness of the proceeding, that is no objection here, no more than it is in a *concessit solvere*; and yet there they will not pretend but that a prohibition lies upon this suggestion; their custom only warrants for what is within their jurisdiction. In 2 *Inst.* 229. on the statute of Westminster the first, cap. 35. my LORD COKE says, "That tho' the action be transitory, yet no man is to be attached by his goods for any contract, covenant, or trespass done without, &c. tho' the man be passing through the ville." And this * holds in our case as well as in the other; and though there be no express case in this point of the garnishee's debt arising out of the jurisdiction, yet the reason of the law is plain: and upon these reasons I prayed a prohibition.

At which DOLBIN Justice was angry, and said no man would have made such a motion but myself, and wondered that I, who had been concerned in THE CITY, should have made such a motion.

HOLT Chief Justice said, There was reason in it. But our pleading of it was after *imparlance*, and so we came too late; and because we did not plead in time, prohibition was denied.

Letchmere and others against Thorowgood and another Case 19.
Sheriff of London.

Hilary Term, 2 & 3 Jac. Roll. 82.

TRESPASS (a) by the assignees of commissioners of bankrupts against the Sheriffs of London and others for taking their goods. On not guilty pleaded a special verdict was found to the following effect. One *Toplady*, by trade a vintner, had a judgment against him; on which judgment a writ of *fieri facias* was awarded tested the 27th April. On the ensuing day, viz. the 28th April

but this relation shall not operate so as to make the Sheriff a trespassor for taking the goods under a *fieri facias* tested before though not delivered to him till after the act of bankruptcy committed. — S. C. 3 *Mod.* 236. S. C. Comb. 123. 1 *Ld. Ray.* 724. 1 *Bl. Rep.* 67. 205. 1 *Bur.* 20. 1 *Atk.* 260. *Doughl.* 415. and the case of *Smith v. Miles*, 1 *Term Rep.* 476. and see *Cook's Bank. Laws*, p. 552 to 630.

(a) In the former edition of this work a reference is made, "vide *supra casu* 73," but as the editor has not been able to find the case there referred to, he has taken the liberty of inserting the substance of

the special verdict, between the * * two stars, from the reports of the same case in 3 *Mod.* 236. and *Comb.* 123. in order to render the reporter's account of the judgment of the Court more intelligible.

Toplady

CLERE
v.
ANDREWS.

(a) S. C. 1 *Vent.* 65, 73.
4 *Bac. Abr.* 254.

(b) 1 *Saund.* 67.
1 *Sid.* 362.

(c) 1 *Leon.* 277.
Godolp. 430.

* [12]

LETCHMERE
v.
THOROWGOOD.

Toplady became a bankrupt. On the 29th April the Defendants took the goods by virtue of the *feri facias*. After this seizure and before any *venditioni exponas*, viz. on the 4th May following, an *extent* issued out of the Exchequer against two persons who were indebted to the King, and by inquisition, *Toplady* was found indebted to them, whereupon the goods seized under the *feri facias* were taken out of the sheriffs hands by virtue of the *extent*. On the 2d June following the commissioners assign the goods to *Toplady's* creditors. Afterwards the goods were sold under the *extent***.

I NOW ARGUED it again upon this point, That though by the statute of bankrupts the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officers trespassors, who had a good authority, and took the goods lawfully; and so is the case of *Baily v. Bunning*, Sid. 271, 272. (b)

THE COURT clear, that the verdict was against the Plaintiff, entire damages being given, and that this action lay not against the officers, though *trouver* would against the party (c). And so judgment for the Defendant.

(b) This case as well as that of *Baily v. Bunning*, it is said, were decided entirely with respect to the liability of the officers, 3 Lev. 192. 1 Bur. 20. 1 Term Rep. 480. and not upon the respective powers of the two writs of *feri facias* and *extent*. 1 Bur. 36. But see, upon this subject, the cases of *Upson v. Sumner*, 2 Bl. Rep. 1251. 1294. and *Rorke v. Dayrel*, 4 Term Rep. 402.

(c) See vide post 146. *Letchmere v. Toplady*, where it appears that the assignees brought *trouver* to recover back the goods taken under the *extent*, and this judgment in *trespass* pleaded in bar, which on demurrer the Court held to be good. Salk. 111. See vide 1 Bur. 20. 2 Bur. 816.

Cafe 20.

The being rated to and paying the poor rates assessed on a tenement under ten pounds a year, is sufficient notice, under the 1 Jac. 2. c. 17. to gain a settlement by a subsequent residence of forty days.

S. C. 3 Mod. 247.
S. C. Carth. 28.

* [13]

The King against Payne.

ORDER of Sessions in *Essex* for removing a poor man and family in *Malden* there, to another place, upon the account that he was a settled inhabitant, by remaining above forty days (a) after taking an house, and being rated to the poor there.

Held by THE COURT to make a good settlement within the new statute, 1 Jac. 2. c. 17. f. 3. though there was no notice in writing given to the churchwardens of his coming; and that coming in publickly, by taking a house and being rated in the poor's rates, and so observed by the officers of the parish in their parish-book, is sufficient notice; and that the rather, * because by the preamble of the statute it is apparently meant only against private and clandestine removals, and not publick ones, of which the parish takes notice itself. (b)

(a) See 13 and 14 Car. 2. c. 12. 2 Bott's Poor Laws. 5 edit. page 119.

(b) The report of S. C. Carth. 28. agrees with this, that the assessing *Payne* to the parish rates, and receiving the money assessed, was sufficient evidence that they knew he was an inhabitant there; but by the S. C. 3 Mod. 247. the Court are said to have thought notice in writing necessary to satisfy the statute, 3 Jac. 1. c. 17. f. 3. The statute of 3 William and Mary, c. 11. however, seems to have removed all doubt upon the subject of this case, for after declaring that the forty days residence, in order to gain a settlement, shall be ac-

counted from the publication of the notice in writing in the parish church, it expressly provides that any person who shall be charged with, and pay his share towards the public taxes, shall gain a settlement, though no such notice in writing be delivered and published. See *Rex v. Talbury*, Foley 123. Carth. 396. 2 Salk. 476. *Rex v. Chertsey*, 5 Mod. 454. *Rex v. Abbots Langley*, Foley 110. Stra. 835. 1 Bar. K. B. 285, the 2 vol. of Mr. Conft's edition of Bott's Poor Laws, 124 to 126, and 219 to 227. and 4 Com. Digest, "Justices Peace" (b. 72.)

Humfreys

Humfreys *against* Vaughan and his Wife.

Case 21.

DEBT *against* husband and wife; and they appeared by attorney: No error, though the wife be under age, because the husband may by law make an attorney, and appear both for himself and wife.

Husband and wife may appear by attorney, though the wife be under age.

1 Roll. Abr. 288. Cro. Eliz. 133. 2 Lev. 38. 3 Lev. 403. 1 Roll. Rep. 303. 5 Mod. 209. 1 Vent. 185.

Coan *against* Bowles.

Case 22.

TWO avow as bailiffs, and have judgment. Error brought, and error assigned that one of them was within age, and appeared by attorney: if ill: (a)

Infancy cannot be assigned for error in replevin. S. C. Post. 165. S. C. Carth. S. C. 1 Salk.

122, 179. S. C. 4 Mod. 7. S. C. Comb. 100. S. C. 12 Mod. 1. S. C. Holt, 358. 93, 205. 2 Saurd. 212.

(a) The Court held the avowry good; for that they all make but one bailiff, and appear in *entre droit*. See S. C. Post. 165; and the Cases there cited.

The King *against* Ayliffe and Freke.

Case 23.

AYLIFFE was attainted and executed for treason; *Freke* as his executor brings a writ of error.

An executor may bring a writ of error to reverse the attainder of his testator for treason, as well as for felony.

HOLT *Chief Justice* at first doubted if executors could bring it, but agreed that they as well as the heir might bring it in case of felony, according to *Marsh's case*. (a)

S. C. Comb. 114. S. C. Holt, 304. S. C. Salk. 295. F. N. B. 21. 1 Leon. 325. 1 Roll. Abr. 748. 1 Burr. 410.

And at last of ALL THE COURT held that there was no difference between *treason* and *felony* as to this point; and that the executor being injured by an erroneous attainder, might bring the writ of error: though by some it is necessary to aver a personal estate, for otherwise he is no ways damnified; whereas an heir is, though there be nothing descended to him, because of the corruption of blood.

(a) 5 Co. 111. 2 Cro. Eliz. 225, 273. Owen 147. 1 Leon. 125.

Knight *against* Parry.

Case 24.

ON motion for a prohibition (the case I did not take) (a) it was held by HOLT *Chief Justice*, That in case of part-owners of a ship, if the majority do send out a ship, they shall be liable to those who

Partowners of a ship, the majority may send her out without consent of the rest.

S. C. Carth. 26. S. C. Holt. 647. S. C. Comb. 109. 1 Keb. 38. Ray. 78. 1 Mod. 62. 1 Lev. 29. Co. Lit. 200. Stra. 890. Fitzg. 197. 1 Will. 101. Ld. Ray, 223. 235.

(a) The case was thus: There were several part-owners of a ship, and the major part of them agreed to send her on a voyage to sea, but the rest disagreed, whereupon the greater number, according to the common usage in such cases, suggest in the Admiralty Court the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly

see

KNIGHT

PARRY.

* [14]

The Admiralty Court may proceed upon a *stipulation bond*.—

who do not consent, *in case there be a profit*, but the majority then are answerable for all hazards: but if a profitable voyage, who shall have consuance or jurisdiction of * it, is the *quære*.

AGREED, That if they take bail by way of *stipulation*, they may proceed against executors there in their own way. (b)

Ray. 78. 6 Mod. 162. 1 Bar. K. B. 415. Ld. Ray. 223. 1285. 3 Term Rep. 267. 323.

set a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themselves jointly and severally to the disagreeing partners, in a sum proportionable to their shares, according to the value set by the appraisers, &c. which is usually done in that Court to secure the shares in the ship of those who disagree to the voyage, against all adventures.—*Parry*, one of the disagreeing partners, takes out a *scire facias* upon such a recognizance, entered into by *Knights*, and sentence was had against him in the Admiralty Court, from which he appealed to the King in Chancery, and a commission of delegates was actually taken out.—*Knights* now moved for a *prohibition*; for that since an Admiralty Court

had no jurisdiction in this case, all was done, *coram non judice*. S. C. Carth. 27.

(b) The reports of this case in Carth. 27. and Comb. 110. say that the whole Court were of opinion that the Admiralty Court had no jurisdiction in this case; the recognizance or stipulation on which the suit there was founded, being done upon land: And therefore that *the prohibition* was granted.—But see the case of *Graves v. Hedges*, Holt, 470; *Lambert v. Airetice*, 20 Viner Abr. 338. pl. 12. 1 Ld. Ray. 223; *Blacket v. Ansley*, 1 Ld. Ray. 235; *Dimock v. Chandler*, 2 Stra. 890. *Oulton v. Hedden*, 1 Willf. 101. *contra*. See also *Menetone v. Gibbons*, 3 Term Rep. 267, and *Smart v. Wolff*, 3 Term Rep. 323.

Case 25.

Garrett against Dandy.

In debt on a bottomree bond to pay money, and perform covenants, the Defendant, is not bound to put in bail by the statute 3 Jac. 1. c. 8. on a writ of error on the judgment. S. C. Comb. 105. 2 Bulst. 54. 2 Keb. 131. Carth. 29. 6 Mod. 38. Hob. 265. 1 Lev. 260. Yelv. 227. 2 Stra. 1190. Lucas, 281. 2 Burr. 747.

DEBT on a bottomree bond, with a special condition to pay three hundred pounds with interest at the return of the ship *Prudent* in thirty-six months, with thirty-two pounds a month for every month after, if not lost or cast away before; and also to perform covenants and agreements in a certain writing or bill of *bottomree* made the same day. The Defendant craves *oyer*, and pleads the statute of usury. The Plaintiff replies, *Non corruptè fuit agreementum*. The Defendant demurs. Judgment for the Plaintiff. Writ of error is brought in the Exchequer Chamber.

TREMAIN *Serjeant* moved for liberty to take out execution, no bail being put in according to the statute.

I OPPOSED it; and moved for a *superfedeas*, a writ of error being brought and allowed; for that no bail was required by the law in this case. The statute of the Queen doth not reach to it, for there it is only an injunction on the Chancery to take it; the statute of 16 and 17 Car. 2. c. 8. f. 3. doth only make that of 3 Jac. 1. c. 8. perpetual, and enlarges it in no cases but after verdict; and so our case is out of that, and within none but the 3 Jac. 1. c. 8. "in any action or bill of debt upon any single bond for debt, or obligation for payment of money only, or upon any action or bill of debt for rent, or upon any contract." Now ours is within none of these; it is not for payment of money only, but also for performance of covenants; and for this there are express authorities; as in *Michaelmas term*, 18 Car. 2. in the King's Bench, in the case of *Callwood v. Ballard*, (a) Mr. COLEMAN prayed execution in debt upon an obligation to perform covenants in an indenture; performance

(a) 2 Keb. 131.

pleaded;

pleaded; breach assigned in nonpayment of rent; verdict for the plaintiff, and COLEMAN moved that execution ought to go, unless the party put in bail; and WILD *the King's Serjeant* opposed it; this rent comes in by the way of collateral breach, and the action is not debt for rent, or for money only, but for performance of covenants; even in debt on the indenture, if the breach were on reservation of rent, there must be bail, but not in any counterbond to save harmless, or debt for a penalty in any articles indented; ET PER CURIAM, execution stayed without bail. 2 Keb. 131. In the case of *Vernett v. Debushe*, in Trinity Term, 19 Car. 2. in the King's Bench, judgment in *case* on a bill of exchange, bail not required, because the words of the statute are *debt*, and it is not to be enlarged, but rather restrained. (a) In Mich. Term, 10 Jac. 1. in the case of *Gilling v. Baker*, (b) a bond for performance of covenants; debt upon an arbitrement is held to be out of the statute; and debt for arrearages due upon account held not within it, as is the principal case in *Bulstrode*. In Trinity Term, 1680, there was an action brought upon a bond with a condition to pay, perform, and keep all covenants in an indenture. The defendant pleaded performance, and demurrer general, and judgment for the plaintiff, and no breach assigned for nonpayment of rent, but only a general demurrer, because there were negative covenants in the indenture of lease; and on a writ of error, it was held in the court of Common Pleas by NORTH Chief Justice, ELLIS, WINDHAM, and CHARLTON Justices, that there needed no bail. This was upon debate; a note of it I had from MR. GOODALL, then clerk of the errors, who noted the case, but not the names. In Easter Term, 16 Car. 2. in the King's Bench, in the case of the Dean and Chapter of *Paul's v. Capell* the like rule (c). I have a copy of the rule for a *superfedeas* on SIR WILLIAM WILD's motion for a writ of *superfedeas* and *restitution*, execution being taken out for want of bail. Besides all this, the reason of the law is with us, for the intent of the statute was to require bail where the cause was plain, as in case of payment of money only: (d) but in other matters, as covenants, there is more nicety in the law as to pleading, and judgment might be had against another upon points nice and difficult, and therefore such cases are not mentioned, but admitted. Besides, at the common law, a writ of error is in its own nature a *superfedeas*, and forecloses the hands of that court where the original judgment was given, by a removal of the record; and therefore this statute, which is introductive of a new law, ought not to be construed by equity, or extended further than the words do reach, and it hath always received such an interpretation, as the cases I have cited do evince.

THE COURT took time to consider of it, and look into the cases; and afterwards declared their opinions that no bail was needful, and gave rule for a *superfedeas*; which my client had accordingly.

(a) 2 Keb. 234.

(b) 2 Bulst. 53. Yelv. 227.

(c) 1 Keb. 613. 690. 1 Lev. 117.

(d) Therefore it hath been adjudged that in error of a judgment on a bottom-

ree bond, BAIL is required; for the contingency having happened it is in every respect a bond for the payment of money. Pitt v. Coney. 1 Stra. 476: See 2 Burr. 746. 4 Bac. Abr. 673.

Ca'e 26.

* The King against Johnson.

* [16]

The penalties inflicted by 5 Eliz. c. 23. for not surrendering to a proclamation on a non est in-
ventus returned to a writ of excommunicato capi-
endo are discharged, unless the writ contains the additions re-
quired by the statute 1 Hen. 5. c. 5; but *quære* if the writ is void for the want of them.
2 Jones, 89.
Jones, 226.
1 Roll. Abr. 174.
12 Co. 77.
Cro. Car. 197.
1 Mod. 70.
3 Mod. 42.
1 Salk. 294.
Stra. 265.
Andr. 220.
3 Com. Dig. "Excommen-
gment." (B 4)
2 Bac. Abr. 315.
323.

THE DEFENDANT was excommunicated for refusing to bring an inventory in the Court Christian, and a writ of *capias* sued, and he taken upon it; and, being in custody of the marshal, he pleads 5 Eliz. c. 23. which enacts, "That in the writ *excommunicato capiendo* there shall be addition according to the statute of 1 Hen. 5. c. 5; and then pleads the statute of 1 Hen. 5. c. 5. and that in the writ there was no sufficient addition, *Et hoc paratus est verificare unde petit judicium et quod ipse de brevi præd' exoneretur*. Demurrer to it.

I, being of counsel against the defendant, ARGUED, That the 1 Hen. 5. c. 5. doth not extend to this case, for that must be an *original writ*, in which *exigent* is awardable; it reaches not to a record, because the plea is holden on a *plaint*, and reaches not to a return of *rescous*, by COKE, 2 *Inst.* 65, and 666. Regularly at the common law, if a man had no name of dignity, his *christian* and *sir-name*, without any farther addition, had sufficed; then the 5 Eliz. c. 23. doth not make the writ void, but was made on purpose to enforce the writ, as appears by the preamble. The twelfth and thirteenth sections, as they are divided by Mr. Keble, seem several; but, as they are in truth, and upon the roll, they make but one joint sentence, they are all but one *PROVISO*. Upon the parliament rolls there are no sections, points, colons, &c.; they must therefore be taken together; "PROVIDED also and be it enacted" goes to both the sections, and then it is most evidently plain; then it is thus: "If in prison, beyond sea, under age, or *feme covert*, they shall not incur the pains and penalties of the act, but may plead such matter in bar of levying such pains." "If he have not a lawful addition, according to the statute (a) requiring it in cases of certain suits whereupon process of *exigent* are to be awarded or not, for the causes mentioned in that act, then all the pains and forfeitures limited to be void, and by plea to be allowed so;" It doth not say the writ shall be void, or the party discharged; and according to this opinion are all the authorities: if the writ be delivered of record, tho' it do not mention any of the causes expressed in the statute, it is good as for costs; but if a *capias*, with proclamations and penalties therein, be awarded, these penalties and forfeitures only are void, as in the case of *Hughs v. Bendy*, Cro. Car. 197. This appears also from *the King v. Redmayn*, Cro. Car. 199. for there he pleads *quoad* the penalties and forfeitures, that it was not * for any of the causes mentioned in the statute, and *quoad* the *excommunicato capiendo* he pleads another matter, *viz.* the pardon. In *Browne's case*, in Hilary Term, 3 Car. 1. is the same; it is in *Benlow's Rep.* 200; there moved that he should be discharged of the penalties, because for none of the causes; but held by the Court he should not be delivered from his imprisonment until absolution. The opinion of discharging absolutely for want of one of those special causes, hath been exploded ever since king James's time. The writ ought to contain a cause of ecclesiastical consueance, and that it doth here; and want of addition is in the same statute, by 5 Eliz. c. 23.

* [17]

(a) 1 Hen. 5. c. 5.

as want of one of those causes; and therefore those authorities are express to the purpose: as to the case of *Etherington*, 2 Keb. 300. and *Thwing's case*, 2 Keb. 31, 34. because no writ was delivered upon record, and that is the reason of the *anonymous case*, Cro. Jac. 566. and *Parker's case*, Cro. Car. 583. the Court only avoids the penalties, and not the writ.

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v.
JOHNSON.

And rule was given accordingly, that he should be detained till absolution.

No bail on writ *de homine replegiando* for one taken on a *capias excommunicato* by 3 Edw. 1. c. 15.

A commitment
on an *excom. cap.*
is in execution

NOTE, If the writ do not mention him to be commorant in the diocese (which *Johnson's* writ doth) this vitiates it, *Moore* 467. but no notice taken of any need of addition.

An *excommuni-
cato capiend*
must state the
party to be com-
morant in the diocese.

Cary against Bacchus.

Case 27.

WRIT OF ERROR in the Exchequer Chamber upon a judgment in the King's Bench, in an action on the case. *Cary* declares, That the franchise and liberty of returning and executing all writs, bills, and precepts out of the courts of the king and his progenitors within the liberty of *Westminster* is an ancient franchise and liberty; that the plaintiff such a day was, and yet is, seized of the office of bailiff of the liberty aforesaid, and as bailiff of that liberty of right had, and ought to have, the execution and return of all writs issuing out of the King's Bench directed to the sheriff of *Middlesex*, and to be executed within that liberty (except a place called **THE SANCTUARY**) (a) and the fees and profits of such executions and returns; that the defendant *præmissorum non ignarus*, without the licence, and against the will of the plaintiff, did break and enter, and the goods of one *John Easton*, to the value of forty-nine pounds, by virtue of a *feri facias* out of the King's Bench, returnable *tali die*, in execution for debt, damages, and costs in the writ certified to be recovered, did take, whereby the plaintiff lost the execution and the return of the writ, and the fees therefore due. Demurrer, and cause shewn, that *non apparet quo modo* the plaintiff was seized of the office, nor what right or title he hath thereto, &c. Judgment for the plaintiff. Inquiry of damages to forty-nine pounds, &c. The general error assigned.

Case, by the bailiff of a liberty who has the execution and return of writs, against one for entering his liberty; and executing a *feri facias*, without shewing by what right he claimed the liberty, is good.

S. C. Comb. 31.
Post. 64.
1 Roll. Rep. 110.
1 Vent. 399.
2 Vent. 292.
Cro. Jac. 43.
4 Mod. 173 420.
3 Lev.
1 Lutw. 119.
9 Co. 28.
Comb. 198.
1 Wiif. 326.
1 Burr. 440.
443.
1 Bac. Abr. 57.
4 Bac. Abr. 151.
1 Term Rep. 428.
3 Term Rep.

I ARGUED for the plaintiff, That this declaration was ill, because it did not set forth his title, nor that it was an ancient office, according to the case of *Symonds v. Seebourne*, Cro. Car. 325. where it was held necessary to alledge it an ancient house and ancient lights, and that time out of mind the lights were there; a prescription is necessary to the house, tho' not to the person, *Earl of Rutland v. Bowler*, Palmer 290. a prescription to the thing. But that which I insisted on chiefly was this, that a subject cannot be seized of the execution and return of writs of common right, without grant or pre-

* [18]

(a) But see 8 & 9 Will. 3. c. 27; the 9 Geo. 1. c. 28; and the 11 Geo. 1. c. 22. by which this place and all others of the

like kind, in which debtors were privileged from arrest, are abolished.

CARY
v.
BACCHUS.

scription; nay, a man cannot prescribe to have a return of writs, because they issue out of a court of record, and no prescription can be of it, for that a usage can neither create nor support it, according to the abbot of *Strata Marcella's case*, 9 Co. 28. This is a right not triable *per pais*, but must commence by grant. Now of common right, the execution and return of all writs belong to the sheriff, as in *Mitton's case*, 2 Danv. 293. and of this you take notice; and therefore to divest that right, they ought to shew how they come to it; and supposing they have a grant, or may prescribe, yet they ought to shew their title by one or other, for that *prima facie* the right is with the sheriff: and none of the cases that yet have been adjudged do come up to this; for in case of *watercourses* and *lights* they all are founded upon a particular reason, which fails in this case, viz. That the defendant's act, being a stranger, was *tortious*; and then to say *habuit et habere debuit*, or *de jure consuevit*, is good enough, because possession is enough against a stranger; and *Sands v. Trefuse*, Cro. Car. 575. goes upon this very reason of a *tort* (b). But here of common right this belongs to the sheriff, and it appears by their own shewing that what the defendant did was by authority from the sheriff. All the possessory actions that are in this manner are against strangers, whose act must be wrongful whosoever hath the right; and I know of no one case in the law where this sort of declaration was ever made against him that had the common right. In the case of strangers the thing is reasonable in itself, and here against us it is as reasonable that they should shew their particular right, how they come by it.

* [19]

POLLEXFEN *Chief Justice*. Your distinction * is between him that hath right and a stranger; but suppose two grantees of two fairs adjoining, and the first brings an action against the second, &c. would not this declaration serve: it is a good way in all cases, and upon a trial the right must be proved, and so it must have been in your case, if you had taken issue: there is no inconvenience in this form of declaring.

And the judgment was affirmed.

NOTE, That the declaration in *Vidian's Entries* upon the seven hundreds in *Glocester*, which was *Sir Robert Atkins's case*, was the foundation of this judgment.

(b) Villers v. Bell, ante page 7, and Palmer v. Keblethwaite, Post. 64. Stocks

v. Booth, 1 Term Rep. 428. But see Rider v. Smith, 3 Term Rep. 768.

* Trinity Term.

• [20]

The First of William and Mary,

I N

T H E K I N G ' s B E N C H.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*
Sir WILLIAM GREGORY, *Knt.* } *Justices.*
Sir GILES EYRES, *Knt.* }

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Sleigh against Chetham.

Case 28.

Michaelmas Term, 1 Jac. 2. Roll. 96.

W RIT OF ERROR to reverse judgment in a FORMEDON in remainder on a settlement made by Sir Samuel Sleigh, wherein the lands are demanded as heir to Samuel Beeson.

In the Common Pleas the case was thus: A FORMEDON in remainder: The tenant appears by attorney, and pleads several pleas, and after issue joined a venire is awarded returnable in Trinity Term, at which time the tenant doth not appear, but casts an effoin: the effoin is challenged; that is adjourned to Hilary Term; and an imparlance from thence to Easter Term, and then because the tenant saith nothing to save his first default, there is a final judgment given.

Mr. SERJEANT HOLT argued in this manner, First, Whether this challenge to the effoin should have been adjourned or determined immediately? Secondly, Whether this challenge be good in substance? Thirdly, Whether there should have been a petit cape awarded before judgment final? FIRST, This challenge ought not to have been adjourned, but determined immediately, that is, in such case where the Court can examine it presently, and need not a jury to try the truth of it; and to delay it, is a disadvantage to the tenant. Now this is matter which appears to the Court, and there is no matter

INFORMEDON in remainder, if the tenant do not appear to the return of the venire, but casts an effoin, which is challenged, and an imparlance granted to the subsequent term, and the tenant does not then save his first default, final judgment may be signed, without petit cape, although the tenant originally appeared by attorney.

S. C. Post. 65.
S. C. 3 Lev. 67.
S. C. Carth. 45.
S. C. 1 Lut. 489.
Fitz. N. B. 212.
Hob. 8.
Lutw. 857.
Co. Lit. 372.
5 Com. Dig. 11

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CRETHAM.

¶ [21]

needing a trial by jury; here it is that there was an attorney. *Rex v. Sir John Dryden, Cro. Car.* 511. there it was determined without any adjournment, and an adjournment is to the damage of the tenant, for if the *essoins* had been cast and quashed, the tenant had liberty to appear the *quinto die post*; now, by adjourning it, he hath lost the benefit of that appearance, and the demandant hath lost * the benefit and opportunity of taking the advantage of such default. In *Co. Ent.* 339. there is the very entry of this, when an *essoins* was quashed. In the 9 *Hen. 5. pl.* 12. there was a *petit cape* awarded. They by adjourning the determination of it have damaged the tenant; that is error. SECONDLY, Supposing it should be adjournable, yet it is ill, because they should have taken it that the attorney was alive, but removed; for where the attorney is alive and unremoved, the attorney ought to have been *essoined*: It is on their part to aver (a); the party who claims an estate for another's life, must aver his life; and it need not come on the other side: In case you plead another executor, and not named, you must aver his life (b). For this reason the challenge to the *essoins* is ill. THIRDLY, But suppose the challenge good, and the *essoins* well quashed, yet judgment final ought not to have been given without the awarding of a *petit cape*. I agree the quashing of an *essoins* turns to a default, yet a *petit cape* must be awarded, for it is a default saveable, and there is no way to save it but by the issuing of a *petit cape* and its returns; it is saveable because cast by a stranger without any precedent authority from him, and he may come afterwards and it shall not be an *essoins* to him (c). If it be no *essoppel*, then the default may be saved afterward (d). Then if it be a default that may be saved, I am sure he cannot do it but by a *petit cape*. This is a default after appearance, and to be saved only by a *petit cape*, which awards seisin into the king's hands, then there is a summons to the tenant, &c. Now here is a judgment on a default after an appearance without the awarding of a *petit cape*; and there are but two cases where this ought to be so, neither of which is ours; as, where there is a default after the merits of the cause tried (e), as on a summons to hear judgment, or the like. The reason there was special, because the cause was tried, and he had nothing to say if he did not save his default: and so where it is a default that is a departure in the law in despite of the Court, there needs no *petit cape*; as, 9 *Hen. 6. pl.* 48. 38 *Edw. 3. pl.* 3. 12 *Hen. 7. pl.* 10. That is the reason given why a *petit cape* should be awarded, that he may be heard; but when he makes default on a special day given, the entry is, "*Quia recessit in contemptum Curie*;" the same is of an *imparlance*, if of * a day given the same term, no *petit cape*, because a departure in despite of the Court; but if to another term, a *petit cape* ought to go (f). I would know what time the tenant may save his default in; can he do it before the *essoins* be quashed? and that cannot be, because it is no default till judgment that the *essoins* be quashed. Can he save it after? He cannot then, because he is turned out of court (say they) upon a default. This is so great an extremity, that by his mistaken *essoins* the party is put out of all

¶ [22]

(a) Dyer, 304.

(b) 21 *Edw. 3. pl.* 25. *Rast. Ent.* 584.

(c) 14 *Hen. 6. pl.* 4.

(d) Bro. Abr. title "Default," pl. 99.

(e) 4 *Hen. 6. pl.* 28.

(f) 1 *Bolt.* 159.

power of trying the merits of his cause, *Rastal's Entries* 274. 2 *Inst.* 314. & 11 *Hen.* 4. pl. 87. like to this.

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v.
CHETHAM.

E CONTRA it was argued, That this default hath the mixture of a contempt (g). A *petit cape* is only a *summons* to call in the defendant to shew cause why judgment final should not be upon his default; and it is an incongruous thing in this case to have a *petit cape* upon this sort of default, for this is a default that arises in construction of law upon an insufficient *essoins*, it is all upon the legality or illegality of the *essoins*. Now pending the argument of this, the attorney was in court; and when the matter was determined, they would have a *petit cape* for the party to shew cause why he hath cast this insufficient *essoins*, which hath been argued and determined insufficient before.

Afterwards, in Trinity Term, 1 Will. & Mary, SERJEANT LEVINZ for the plaintiff in the writ of error: The errors here are two; FIRST, The writ ought to have abated upon the plea of *bis petitum*; SECONDLY, Judgment final ought not to have been given upon the challenge, but a *petit cape*. In all real actions, upon a *bis petitum* the writ ought to abate. Now this is well pleaded; for we say that the six messuages are parcel of the thirty-five messuages: Now the demand of the manor is certain, and thirty-five messuages, and six messuages in *Nutwell*. If the manor be well enough demandable by itself, it is certain enough then when he demands a manor and thirty five messuages in such a place, and six in another, our plea is good. But the great point is, here is A FORMEDON in remainder, issue joined, the tenant casts an *essoins* after appearance by attorney, and therefore the *essoins* was disallowed, because having once appeared by attorney, the attorney is so till the end of the suit, and the party is always in court by attorney. Where a thing to be done in person is required, as in case of wager of law on a *non summons*, * there an *essoins* may be, but not otherwise where there is once an attorney; and the books (b) do warrant this difference. Then the *essoins* was not well cast, and some judgment ought to be given upon it; but here it is adjourned and adjudged, which ought not to be final without a *petit cape*, 21 *Edw.* 3. pl. 37. 3 *Hen.* 4. pl. 4. 6 *Hen.* 4. pl. 72; and there is a *petit cape* awarded, though it was adjourned and adjudged, yet a *petit cape* ought to go, 1 *Edw.* 3. 1. pl. 2. 2 *Inst.* 387. Here is an imparlance from Hilary to *quindena Pasche*, and so the judgment is given upon the imparlance. I agree upon the imparlance and departure in contempt of the court, judgment final ought to be given, i. e. where the imparlance is general, without any day certain, and the tenant doth not appear being demanded, then a final judgment (i). But here is an imparlance till *quindena Pasche*, *ad quem diem* the tenant appeared by attorney, and so there is no default, but the attorney doth still appear in court; here is no default upon the imparlance, so that judgment is not given upon any default upon the imparlance, but the judgment is given purely upon this reason, that he did not save his first default on the *essoins*; and in that case, if an ill *essoins* be cast, there ought to have been a *petit cape*; here is

* [23]

(g) 12 *Hen.* 4. pl. 14.
(b) 4 *Hen.* 6. pl. 11. 20 *Hen.* 6. pl. 4. 23.
2 *Edw.* 4. pl. 15. and pl. 16. 2 *Hen.* 5.
pl. 2. 25 *Affise*, pl. 17.

(i) Bro. Abr. "Grand Cape," pl. 22.

... next now given upon the first *effoin*, turned to a default. This reference is taken in Fitz. 211. If he appeareth at the day, he doth not say anything to save his first default. But they object, To what end should a *petit cape* be awarded? I answer, Though he could not save the default, yet the *petit cape* ought to be awarded; for the end of the writ is to seize the land, that is the principal end of it, and a summons to save the default is but of grace (k). Though the default cannot be saved, yet a *petit cape* ought to go.

[24]

SERJEANT POWELL, *é contra*, The question is, in a *formedon* or other real action, if, after issue joined, the tenant make a default, final judgment shall be given? After issue joined, the final judgment for return of the land is to be. (l) The awarding of a *petit cape* is in favour of the tenant, and the want of it will not be error where it is not necessary. (m) In *Penryn's case*, Moore 403. is no mention of that resolution * in *Penryn's case*, 5 Co. 85. (*qui inde*) Littleton, *sec.* 51. Co. Lit. 295. *Hern v. Liltourne*, 1 Bulst. 159, 161. If in case of a writ of right it holds so, much more in a *formedon*, or other real action, because in a writ of right the right is for ever concluded. (n) If after the issue joined an *effoin* be cast, and adjourned and adjudged against the tenant, it is peremptory, it turning to a default; it is a default peremptory. (o) It is true, in some cases, where he does not appear at the adjournment, it will turn only to a common default; but when he appears, and controverts the validity of the *effoin*, and adjudged against him, it turns to a default peremptory. (p) A special imparlance will warrant only a *petit cape*. (q) But when it is a general imparlance, and a default, then final judgment. (r) Then *quare* if the defendant's appearing after the imparlance will alter the case? The defendant being in court when judgment was given, might have saved his default, by pleading "water," "in prison," &c. and the *petit cape* is only to bring the party in to hear judgment, or to save his default. (s) The seizing the land into the king's hands is only as a penalty. There are some other cases where he may appear upon the *petit cape*, though he hath an attorney, as when the attorney is dead or removed. (t) But that he could not do here, for that would be contrary to the record; so that a *petit cape* was perfectly needless to bring the attorney into court, when nothing could be said to save the default. (u) I know no case wherein, after an appearance of the party in court after a default, a *petit cape* need to be awarded to bring in the party to save his default, when he was there present. On the whole, he prayed the judgment might be affirmed.

(k) 3 Hen. 4. pl. 4. 11 Hen. 4. pl. 72. Fitz. "V. ucher," 86.

(l) See *Penryn's case*, 5 Co. and the case of *Williams v. Gwyn*, 2 Saund. 46.

(m) Fitz. "Judgment," 152. 228. 245. 23 Hen. 4. pl. 8. 10 Hen. 6. pl. 2. 3 Hen. 6. pl. 55. 12 Hen. 7. pl. 10. Fitz. "Droit," 27. Bro. "Droit," 4. 57. Moor 403.

(n) See Co. Ent. 171. and the case of *Willoughby v. Edgerton*, Cro. Jac. 35.

(o) Fitz. "Effoins," 16. 53. 138. 2 Hen. 4. pl. 12. Dyer. 104.

(p) 45 Edw. 3. pl. 9. Kelway 41. Fitz. "Grand Cape," 6. 1 Bulst. 159.

(q) Cro. Jac. 292.

(r) 26 Hen. 8. pl. 8. 12 Hen. 7. pl. 10.

(s) Rast. Ent. 112. 369.

(t) 5 Hen. 7. pl. 3.

(u) 1 Roll. Abr. 584.

HOLT Chief Justice. The plea of *his petitum* is ill, because you say six messuages, parcel of the tenements aforesaid, are parcel of the manor, that is no more than to say parcel of the manor is parcel of the manor; but you should have said, six, parcel of the thirty-five, are parcel of the manor, and that would have been a good plea. This *essoyn* is a default, but yet it is a savable default; for suppose the attorney or party were in prison, an *essoyn* is no *estoppel*, because it is cast by a stranger; if it had been a default without casting of an *essoyn*, it had then been savable; now if it be an ill *essoyn*, * why is it not also savable? And when shall it be saved? Not till it be judged to turn to a default: he had day given him upon the question whether it was a default; but when it was adjudged against him, it turned to a default, and then he is thrown out of court; and he hath no day in court, but upon the return of the *petit cape*. *Adjournatur.* (x)

SLEIGH
v.
CHETNAM.

* [25]

(x) The judgment was afterwards affirmed by THE WHOLE COURT, Post. 67.

Browne against Shore and his Wife.

Case 29.

PROHIBITION. The declaration was upon a suggestion on the statute 22 and 23 Car. 2. c. 10. for distribution of intestates estates, and that J. S. died intestate; that A. and B. were his next of kin; that A. died within a year after J. S. and before any actual distribution; that the executors of A. sued there for his part, &c. Demurrer.

The statute of distributions, 22 & 23 Car. 2. c. 10. vests the several shares of the intestate's effects in those who are intitled to distribution at the time the intestate died; and therefore if a relation under the statute die between the death of the intestate, and the administration made, *his share* shall go to his personal representatives.

TREMAIN. The question is, whether this act doth vest such an interest in the party upon the death of the intestate, that if he die before distribution, it shall go to his executors, as much as if he had lived till after an actual provision and receipt of his proportion? It plainly gives a present interest, for there is no time limited or stated by the condition of the bond when the inventory shall be exhibited or distribution made, but it is left to the discretion of the ordinary. Then there is another clause in case of the next of kin, which is also without time, and left indefinitely, i. e. presently. The clause of a year's time is only for the benefit of creditors, that they may not be surprized. As to the case of *Palmer v. Allcock* (a) which was in this court, there was but one child, and so no distribution at all. And therefore some opinions were, that nothing was vested; the words are, "shall deliver and pay," which shall give an interest presently, according to the case of *Oldham v. Bateman*, 1 *Rolls Abr.* 31. where money given to be paid to the infant vests such an interest as he may maintain an action for.

S. C. Ante. 2.
S. C. Comb. 112.
S. C. Holt. 258.
Carth. 51.
3 Mod. 59. 65.
1 Vern. 403.
Comb. 14.
2 Show. 285.
Skin. 212.
1 B.own.
C. C. 303.

DOBBINS é contra. There are no words in this act of parliament that vest an interest. Before this act the ordinary did always endeavour to make distribution, as appears by *Levanni's case*, *Cro. Car.* 201. Now this act only appoints the method of distribution, and impowers him to take a bond with a condition to do it in this and that form and manner. Suppose it were a cousin german dies, and a relation

(a) 2 Show. 407. 3 Mod. 58. Comb. 14. Skin. 212, 218.

BROWNE

v.
SHORE.

* [26]

See the statute
29 Car. 2. c. 3.

born after as an *enseint*, and the number increaseth, if the interest * were vested at the time of the death, then they must have nothing. (b) Now, by "next of kin" must be meant next of kin as they are at the time of the distribution; as in case of a devise of a term to A. and if he die without a son, then to his daughters, and he hath two daughters at the time of his death, and another born after; the first devisee dies, all three daughters shall take. *Stanley v. Baker, Moore* 220. This act hath been literally expounded, and therefore new laws have been made to explain it: here is a sister of the half-blood that dies before he had a right to demand or sue. In *Bunhill v. Newton* in the Exchequer in the year 1683, the money was decreed to the administrator of the father, because no right vested in the son; as a case out of the statute, being but one son.

HOLT *Chief Justice*. It gives a present interest. The act of parliament is the same as if the party had made his will to this effect. The common case of a residuary legatee who dies before probate, his executor shall have administration, and not the next of kin to the first testator; (c) that proves this case. A right of action, or *chose in action* will go to executors. The proviso for a year is to save the administrator from a *devastavit*, by not dividing till he sees the estate. As to *Newton's case*, a man having only one child and dies, whether that were within the meaning of the statute? they did hold, that he needed not the aid of the statute, but had all at the common law; and I doubt the law as to that case, for I think it an interest vested.

DOLBIN *Justice*. I wonder that it was ever made a point: suppose the proviso that gives a year had been left out, what then?

GREGORY *Justice*, of the same opinion.

EYRES *Justice*. The design of the statute was to make a will for the intestate. Consultation PER TOTAM CURIAM.

(b) See the case of *Walton v. Hodson* in Chancery, Hilary Term 14 Geo. 2.

(c) *Dyer*. 372. 3 Mod. 59. 1 Vern. 200. 5 Mod. 247. *Ld. Ray.* 86. 363. 1 *Peck Wms.* 7.

Case 30.

Strode against Osborne.

Easter Term, 4 Jac. 2. Roll. 297.

If a writ of error be directed to A. Chief Justice to remove a judgment *coram vobis et sociis* and the record returned be of pleas before B. *et sociis suis*, the variance is fatal.

S. C. Ante. 3.
S. C. Comb.

113.

S. C. Holt. 268.
Post. 186.

2 Sura. 1155. 1 Term Rep. 240.

* [27]

WRIT OF ERROR on a judgment in the Common Pleas directed to *Herbert*, of a judgment *coram nobis*, and the record is, *placita coram Bedingfield*, and then after issue, there is an entry of *Bedingfield's* death, and a *succedit* of *Herbert*: *quare*, if this be good?

Urged per THOMPSON, That the proceedings in the cause till judgment are *placita* as well as the declaration, and here is part before *Herbert*.

Per HOLT *et ceteros* held ill, because the *placita* was not before *Herbert*, and * the writ of error was quashed. He cited a case in *Rolls*, it is error.

Incledon

Incledon and others *against* Burges.

Case 31.

Michaelmas Term, 4 Jac. 2. Roll. 282.

TRESPASS for breaking his close, and digging and carrying away turf and stones. The defendant pleads, That he was seized of a tenement or messuage, and had a right of common of turbary there, and used to dig stone to be used on his, &c. The replication traverses the plaintiff's prescription: the defendant rejoins, That such a term one of the plaintiffs brought an action of trespass against the defendant, wherein he pleaded the same prescription, and issue joined upon it, and tried, and found for the defendant. The plaintiff demurs.

Exceptions were taken, *first* to the prescription and plea, because there they lay their usage of it larger than the prescription, for in that it is to be employed upon the messuage, they there say they did use the stones upon the tenement. Besides, their prescription is void in law, for they do not say "there were ancient quarries there."

SECONDLY, Then it was urged that the verdict was no *estoppel*, for *estoppels* are to be taken strictly, for they neither give nor take away any right; no man is bound by an *estoppel*, but the parties and their privies; there was cited *Brook. tit. "Estoppel,"* 14. 33 *Hen. 6.* 51, 52. A stranger shall not be prejudiced by it, as he shall not have any advantage. If this *estoppel* shall be good against both the plaintiffs, then one of them will be hindered from ever trying his right, they being joined with the other privileges from any conclusion by that verdict to which that other was no party. He compared it to the case of Remitter, *Co. Litt.* 354, where is a gift to *baron* and *feme*, and the heirs of their two bodies, the husband aliens in fee, and then retakes an estate to him and his wife for their two lives, this is a remitter in deed to the husband against his own alienation, &c.

E CONTRA. As to the exception to our usage, we say we did use it in *et super messuagium et tenementum præd'*, which is all one: We say "they were quarries time out of mind;" and we say "that time out of mind we have used to dig stones there."

SECONDLY, Then the verdict is an *estoppel*, for according to *Farrer's case*, (a) in all personal actions where there is once a bar by verdict and judgment, it is a conclusion. If this man had given him a release, would not that have been a bar? In a *quod permittat*, the verdict had been fatal. * (b) A verdict, whereupon an attain will lie, doth estop all parties and privies to say any thing contrary to the verdict; otherwise where no attain lies: Upon this verdict an attain will lie. The nature of the action is changed by the issue; for where the title is in question, there may be *aid prier*. (c) So *warranty* is pleadable in trespass, where the title is in issue; in respect

In trespass, the defendant justifies for common of turbary under a prescription that there were quarries time out of mind, and that the occupiers of such a house had a right to dig stones there, &c. if on a replication traversing the prescription the defendant may by way of *estoppel* rejoin, a verdict in his favour on the same prescription.

S. C. Comb. 166.
S. C. Carth. 65.
S. C. Holt. 342.
S. C. Salk. 636.
Hob. 255. 260.
Co. Lit. 352.
1 Roll. Abr. 836. 864.
Jones 460.
Cro. Eliz. 352.
1 Salk. 276.
Bunb. 11.
Ray. 456.
Sav. 99.
Stra. 817. 960.
2 Willf. 143.
Ld. Ray. 1550.
1 Com. Dig. 269.
1 Term Rep. 273.

* [28]

(a) *Palm.* 511.(c) 15 *Hen. 7.* pl. 9. 1 *Hen. 7.* pl. 12.(b) *Vide* 13 *Edw. 3.* pl. 2. 2. and 47 22.
7 *Hen. 6.* pl. 8.

INCLEDON
vs.
BURGES.

of the issue, it is pleadable, in respect of the action it is not. (d) Bar in *detinue* is pleadable to *account*. (e) Issue in a personal action, when it tendeth to the realty, is as conclusive as in a real action. The joining of a stranger will not avoid the estoppel. (f) Suppose them joint tenants, yet one of them may prejudice the other, and he shall be bound, unless he bring an action of an higher nature. (g) Husband is estopped, notwithstanding the remitter.

Trespass laid in one king's time, with a *continuando* to another king, and *contra pacem* to the last king, is bad on demurrer.

2 Vent. 49.
Cro. Jac. 377.
148.
1 Sid. 150. 249.
319.
2 Hale 188.
3 Bulst. 32.
Carth. 95.
Salk. 636. 640.
5 C. m. Dig.
"Pleader"
(3 m. 8.)
(3 m. 10.)
5 Bac. Abr. 192.
Rex v. Lookup,
3 Bur. 1901.
6 Brown's Caf.
Parl. 138.

THEN there was exception taken to the declaration: it is for a trespass in Charles the Second's time, with a *continuando* to king James's time, and concludes *contra pacem domini regis nunc*, i. e. of king James's time; now this is as it were no *contra pacem* at all, (b) and is not helped by the statute of general demurrers; for many things are helped by a verdict, which are not helped by a general demurrer; and the statute of Jeoffails in the reign of Charles the Second doth *in terminis* help this *after verdict*; which shews that before it was not good after a verdict, much less after a *demurrer*.

THE COURT gave judgment for the defendant on this point of the *contra pacem*. And therefore delivered no opinion about the *estoppel*, but only said, an estoppel upon a verdict goes a great way. Issue in tail shall never falsifie it. But if one man is estopped, and he joins another with him, whether this shall avoid the estoppel, is a *quære*.

But judgment was given for the defendant on the exception to the declaration.

(d) 2 Rich. 3. pl. 14.

(e) 7 Hen. 6. pl. 8, 9.

(f) Bro. Abr. title "Ejfeptit," 90.

(g) Lit. Sect. 666, 667, 672.

(b) Cro. Car. 323.

Case 32.

* [29]

* Boson *against* Sandford and others.

Hilary Term, 1 & 2 Jac. 2. Roll. 302.

An action on the case for negligence of the master lies against the *part-owners* of a ship as well as against the *master*; but *all* the *partowners* ought to be joined.

S. C. Post. 101.
S. C. 2 Show.
439.
S. C. 3 Mod.
321.
S. C. Salk. 440.
S. C. 3 Salk.
203.
S. C. Comb.
116.

CASE, for goods lost out of a small vessel coming to *London* from *Exeter*, &c. On not guilty pleaded, a special verdict finds the delivery of the goods to the master of the vessel; that the defendants were proprietors of the ship; and that there were several other partowners; that the master received hire for the carriage of the goods; that the owners were not present when the master received the goods; that the goods were lost; that they were worth so much; *et sic*, &c.

THE FIRST QUESTION is, If the proprietors are answerable, or only the master?

SECONDLY, Whether, there being other owners, the action lies against these?

It is found the plaintiff had no notice of the other owners. This is like the case of executors; where only one doth act, action lies

S. C. Carth. 58. S. C. Skin. 278. S. C. 1 Freem. 499. 1 Roll. Abr. 2. 1 Sid. 36. 2 Vent. 75. Hob. 18. 1 Vent. 190. 238. Ray. 220. 2 Lev. 69. 3 Lev. 259. Carth. 62. 1 Salk. 282. 5 Mod. 92. Stra. 128. 690. 1 Will. 281. Cowp. 636. Dougl. 372. 2 Term Rep. 281. 3 Term Rep. 454.

against him only. Besides, this matter ought to have been pleaded, and they cannot take advantage of it now; as, where one joint-tenant brings an action, a joint-tenancy is pleadable; but if the general issue be given, that advantage is lost. (a) This action certainly lies against the owners; for where the master has the advantage, as the owners have the freight in this case, though the servant receive it, he is answerable for the care of his servant. (b) A master is bound by the contract of his servant. (c) If a master send a servant to buy cloth, he must pay for it. (d) They have a benefit by his labour, and they ought to pay for his negligence; their employing of him is like a general contract with all that should send goods to be transported; and the owners may unquestionably bring this action for the hire, if the goods were well transported.

LEVINZ *é contra*. There are twelve owners of a ship, they employ a master, and give him a salary: now in all things of contract all the contractors are necessary to be made parties; and we need not plead it, for he must prove his declaration, and it is every day's experience in case of goods sold. If we prove the plaintiff hath a partner, he is gone, for all are to be charged equally if it be a contract; and this is so, or at least *ex quasi contractu*. If the owners are chargeable, it is because of the implied undertaking to carry them safe, which arises from the contract the law supposes, * by reason of the hire, which all have: whether it be a contract in law or in fact, you must bring all the parties in: Then whether the owners of the ship shall be answerable in point of contract: you cannot charge the master in case of servants, but in point of contract; you cannot charge them with trespass. It hath been adjudged it doth lie against the master, as in the case of *Morse v. Sluce*, (e) and shall it lie against the owners too? The action lying against the master proves it doth not lie against the owners; and in case it doth lie, you cannot charge the owners so long as the master is sufficient; and they ought to have brought their action in another manner, as in the case of officers.

* [30]

LORD CHIEF JUSTICE. It doth certainly lie against them, because they have the profit: by the civil law the owners are liable; not as owners, but as employers; for a dissenting owner will not be liable, for he hath not the benefit of the voyage; (f) either master or owners may bring an action for the freight, *ergo*. — But here it is not brought against them all, there are others not made parties; and if it be brought upon *the contract*, then all are bound; and by the same means as he takes notice of some, he may take notice of all, and therefore the plaintiffs not knowing them is nothing to the purpose; but if it be founded upon *the tort*, then he may have an action joint or several. Suppose debt upon the statute of tythes, and there are two occupiers, it must be brought against both. Here it is not brought upon the express contract, but yet they have all the recompence; so that the reason why they are answerable goes to all, and therefore I doubt it must be brought against all.

(a) See the case of *Deering v. Moor*, Cro. Eliz. 554.

(b) See the Year Books 21 Hen. 7. pl. 39. the 11 Hen. 6. pl. 16, and Lord North's case *Dyer*, 161.

(c) *Plowd.* 11. *Litt. Rep.* 374.

(d) 9 Hen. 6. pl. 53. 12 Hen. 8. pl. 4. Cro. Eliz. 711.

(e) 1 Keb. 72. 112. 135. 1 Vent. 190. 238. *Raym.* 220. 1 *Mod.* 85. 2 *Lev.* 69.

(f) *Knight v. Parry*, ante, 13.

ROSON
v.
SANDFORD.

EYRES Justice. Action lies against a watercarrier, and so is *Nichols v. Moore*, Sid. 36. But I doubt all ought to be parties.

GREGORY Justice. They all make but one owner; but whether it is of necessity, or ought to be pleaded in *abatement*, is a doubt to me. *Adjournatur.* (g)

(g) The Court gave judgment for the defendants, because all the owners were not joined, Post: 105. **DOLBEN Justice** was of opinion that this ought to have been pleaded in *abatement*; but the rest of the

court held it might be taken advantage of on the *general issue*. S. C. 3 Mod. 321. S. C. Freem. 500. But see *Cro. Eliz.* 355. *Lutw.* 696. *Salk.* 440. 2 Mod. 280. 1 Com. Dig. "Abatement;" (F. 8.)

Case 33.

* King against Dillifston.

* [31]

Hilary Term, 2 & 3 Jac. 2. Roll. 494.

A custom of a manor that "if a surrender be made of a copyhold to the use of another, and he do not come in to be admitted after three proclamations at three courts, the bailiff of the manor may, by command of the lord, seize such tenement as forfeited," does not bind an infant.

S. C. Post. 83.
S. C. 3 Mod. 321.
S. C. Salk. 386.
S. C. Holt. 158.
S. C. Comb. 118.
S. C. Carth. 41.
S. C. 1 Lut. 765.
S. C. N. Lut. 238.
1 Leon. 100.
3 Leon. 221.
Cro. Jac. 226.
2 Inst. 382.
Cro. Car. 7.
2 Vern. 367.
537.
Prec. Chan. 568.
10 Mod. 245.
11 Mod. 53.
12 Mod. 123.

EJECTMENT. Special verdict finds the lands in question to be copyhold held of such a manor, and that that manor hath this custom in it, "That if a surrender be made to the use of another, and he doth not come in to be admitted after three proclamations at three courts, that the bailiff of the manor may, by command of the lord, seize such tenement as forfeited;" that there was a surrender to the use of J. S. and his heirs; that there were three proclamations; that none came in to be admitted; that the bailiff did seize, &c.; that J. S. before the first proclamation died, leaving J. N. his son and heir, then and yet an infant, under the age of ten years, &c.

In the Common Pleas there was judgment, That the custom did not bind an infant.

Upon a writ of error now brought here, it was argued, That the lord may seize notwithstanding the infancy; that custom is the life of all copyholds, (a) and if they break the custom they are all at the will of the lord; that a surrender is a thing inchoate, and nothing passes till admittance; if the party dies before admittance, the heir must be admitted; no fine is due before admittance; and if the lord have no remedy to compel admittances, he loses the benefit of his inheritance; this is a reasonable time, three courts; it is his part to further it to get the estate, and in truth it is to the benefit both of lord and tenant. I think there could have been no question if the party himself had lived and been of age. *Baspoole v. Long*, Cro. Eliz. 879. *Yelv.* 1. *Noy* 42. *Godbolt* 269. (b) is express in it. The objection is, *Sir Richard Lechford's case*, 8 Co. 99. (c) That an infant shall not be bound by this custom. I answer, That he is not bound as it is a forfeiture of the estate, but as it is a seizure *quousque* he do come in and be admitted, the lord shall hold it, and take the profits only *quousque*. (d) An infant is bound by a condition in fact, and shall lose his land for breach of it; as, if he do not pay services for two years, he is liable to a *cessavit*; he might

1 Peer. Wms 718. 3 Peer Wms. 151. 1 Stra. 94. 168. 2 Stra. 937.

(a) *Goodwin v. Spray*, Cowp. 474.
(b) S. C. 2 Leon. 101.

(c) S. C. Godb. 268.
(d) 3 Term. Rep. 162.

marry,

marry, and yet if without licence, he forfeited two years value of his inheritance, *Whittingham's case*, 8 Co. 44. (e) An infant is greatly favoured in case of descents, but here he is a purchaser; and where he is so, he shall not have his age in a real action, 47 Edw. 3. 8. *Perryman's case*, 5 Co. 84. (f) The privilege * of infancy is never extended to wrong a third person; the law will not suffer an infant to wrong another no more than it will to injure himself; here is only a temporary forfeiture. *Vide Saverne v. Smith*, Cro. Car. 7. 2 *Rolls Rep.* 372. *Latch* 199. (g) In case of knight-service tenure, because he cannot have it to perform, &c. therefore the lord hath the land in the mean time; the prejudice can be nothing to the infant, but it may be a great one to the lord; till admittance the infant cannot have the land, for that remains in the surrenderer, tho' he cannot alien it, or contradict his former act. *Sir Richard Lechford's case* was the case of an heir by descent, whose ancestor was admitted, but here it is otherwise: that case doth seem to allow that the lord might seize till he did come and be admitted, and so is *Cro. Jac.* 226. By WILLIAMS, he may seize in the interim, and take the mesne profits, and shall not be responsible for them.—But another OBJECTION is, That the custom is not found for a temporary seizure. I answer, That need not, for a general seizure found is sufficient, and the law makes the reasonable exception, that it shall be but temporary in case of an infant, and final in case of an heir at full age. As to the case of *Rumney v. Eves*, 1 Leon. 100. (h) That is the case where the ancestor was admitted, and the infant came in by descent; here he is a purchaser.

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Mr. BALDOCK *é contra*. The infant in this case shall not forfeit. This general custom doth not extend to an infant. They seem to agree that a general custom of forfeiture shall not bind an infant, as is *Sir Richard Lechford's case*; this special custom which they would have intended was never found in all the books: then whether such a custom be good that he shall forfeit conditionally *quousque*? Yet that is a particular distinct custom from the other, and your lordship can never judge any thing of it upon this which is found. Customs are not to be extended further than the very words. A custom to seize generally as forfeit, and a custom to seize *quousque* and during infancy, are different customs, meerly distinct: an infant is not bound by a condition in law, as in the case of *Whittingham*. As to a *cessavit*, that is a question not very plain. Then as to the consequent inconveniencies, there are none in this case, because the estate remains in the surrenderer.

* HOLT Chief Justice. You would prevent a seizure by the infancy of a man who hath neither *jus in re* nor *ad rem*; he hath nothing in it; the forfeiture here is because here is a surrender to a man who will not take it, and yet the surrenderer enjoys it still against his own act. If a copyholder of inheritance die, and leave an infant heir, who doth not come in upon proclamations, according to the custom, the

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(e) S. C. 2 Danv. 776.

(f) S. C. Cro. Elis. 668. S. C. 2 And.
125.

(g) S. C. W. Bendl. 131. S. C. Palm.
383. S. C. Godb. 345. S. C. 2 Roll.
Rep. 344. 361.

(h) S. C. Co. Copy, 75.

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lord may seize; but still as is *Lechford's case*, (i) I agree, that he shall have the privilege of his infancy to come in and be admitted; the lord will lose his fine else. Can you show me any case where the privilege of infancy shall carry it so far as to wrong a third person, as to lose a man's right? To delay it, it may; where is the mischief, the lord shall seize and enjoy *quousque*? That is agreed; as the report is in *Croke* (k), it doth admit of this; here is a remedy for the lord, and a provision for the infant too, it is incident to the tenure, and why is it more unreasonable in case of a copyhold, than it is in case of knight service?

DOLBIN *Jussicr.* It is the general opinion of the realm that an infant is not bound during his non-age: besides, if the jury find it seized as forfeited, we can never construe it to be a temporary forfeiture. (l) An infant may enter when he please, and to say it is a forfeiture, and avoidable again, I do not understand.

It was afterwards argued by MR. NORTHEY, for the plaintiff in the writ of error, and he urged the same things as were before, and also, that the surrenderor shall not take advantage of the heir's being an infant, but he himself, or those claiming under him must only do it, according to *Earl of Bedford's case*. (m) If an office of inheritance descend to an infant, and he breaks the condition in law, it is a forfeiture, and he is bound by it. If an infant be donee of a fine he must perform the condition. (n) The custom seems to be fixed purposely for the benefit of the fine, and the estate in law remains in the surrenderor; the lord hath no other way to get his fine, or his suit and services, which otherwise will be lost. If an infant make a feoffment it is a temporary forfeiture; the infant cannot enter before admission, and so loseth nothing but the profits, which is by his own default in not being admitted. (o) As to the finding, a greater custom warrants the less, as is *Baspoole v. Long*, and 1 *Leon.* 1. and *Co. Lit.* 111. A custom shall be applied according to the particular matter, and every one shall be adjudged within it as far as they can * be, as in case of foreign attachments, a corporation is within it, but yet shall not find bail according to the custom, and so it was ruled, in Easter Term 29 Car. 2. *Batterly v. the Hamborough Company*. (p) The infant is as yet no ways concerned in interest, for he hath no right to intermeddle with the possession or profits till admission, so that he is no ways prejudiced; here is no present right appears to any but the lord; the surrenderor hath none, he is bound by his own act, and perhaps the surrenderee will never take it, it is but reasonable then that the lord should have it in the mean time; and it is found the lessee of the lord was in possession till ejected.

MR. WELD *é contra.* This custom as it is particularly found is uncertain. It is found he shall seize, but not what he shall do with it, whether he shall take it by way of distress; if so, that gives no interest whereon to found an ejectment: nay, he cannot so much as plow the land, *Cro. Car.* 492. and *Plowd.* 541. he can only take the

(i) 3 Co. 99. Godb. 268.

(k) Cro. Jac. 226.

(l) Vide Noy. 93. and Jones 157.

(m) 1 Co. See also 3 Co. 42, 43.
Plowd. 375.

(n) Jones 390. 9 Co. 85. *Plowd.* 364.

(o) Cro. Elis. 351. 1 *Leon.* pl. 357.

(p) Vide 2 *Lev.* 209.

natural profits as they arise without manuring; he is a trespasser in entering as for a forfeiture; then if judgment be given for him here, it must be as upon a title of forfeiture; besides the cause of seizure ought to be found; the custom is ill. It is if he come not to the court, and pray to be admitted, and be not admitted, then a seizure. Now here is a seizure to be upon non-admittance, and that though he do come in, and it be not his default. As to this forfeiture it must be by somebody. It cannot be by the surrenderee till admittance, he is no ways interested, and a custom cannot extend to persons not concerned in the manor; the surrenderor is still liable to do suit and service, so that here is no loss of a tenant. It is said the surrenderor shall not hold the land against his own act. But what hath he done? If his deed take no effect, the land is still his own; as in case of a grant of a reversion not enrolled. The infant here doth not in all respects take as a purchaser, though in some respects he doth, and therefore he shall have all the advantages of his infancy. (g) The taking of the profits is a loss to him. What doth the lord lose? his fine; a fine upon admission is not a tenure or service, and therefore not within the reason of the objection. An infant if he be out of the custom as it is generally found, he must be out of it as to every part.

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Vide Stowell v.
Zouch, Plowd.
359.

HOLT Chief Justice. It is an absolute forfeiture in general; but an infant shall have the advantage of his infancy, when he comes in and prays to be admitted. *Adjornat. pro resolutione Cur. (r)*

(g) Stiles, 146. 2 Sid. 61.
(r) In the Hilary Term following the judges delivered their opinions *seriatim*:
HOLT C. J. was of opinion that the judg-

ment ought to be reversed; but the other judges being of another mind, it was affirmed, Post. page 88.—and see the statute 9 Geo. 1. c. 29

* Shuttleworth against Garret.

Cafe 34.

Trinity Term, 4 Jac. 2. Roll 165, 965.

* [35]

ACTION on the case brought for a *customary fine* due upon the death and change of a lord by the copyholder, laying *quod indebitatus* in such a sum, for a fine *super mortem pro tenementis secundum consuetudinem maner' præd'*, &c. Verdict, on general issue *non assumpsit*, for the plaintiff.

If the lord of a manor assess a fine upon a copyholder for admittance, and die, his executor may bring either an *indebitatus assumpsit* upon the promise, implied by law, or an action of *debt* at his election.

Moved in arrest of judgment. That the action doth not lie, because it favours of *the realty*, no more than *indebitatus* will lie for rent, according to the case of *Brett v. Read*. This is for a duty which arises by a custom concerning land; it is in nature of a relief, and is in respect of the tenure, *Jones* 329. *Cro. Jac.* 599.

CONTRA. It was argued by HOYLE and LEVINS, that this is a flower fallen; it is debt, and why should not an *assumpsit* lie? If reasonable it is a contract, if unreasonable it is void. Debt may be held to lie; it is after a verdict; this is no more than a contract. If I agree to give my tenant a freehold estate, and he agree to give me a fine for it, an action on the case lies; so it does for the purchase money

S. C. 3 Mod. 239.
S. C. 3 Lev. 261.
S. C. Comb. 151.
S. C. Carth. 90.
Yelv. 135.
4 Co. 49.
1 Term Rep.

C. L. 162. 2 Leon. 179. 5 Mod. 439-444. Ld. Ray. 502. Dougl. 728, 729. notis. 616.

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upon sale of lands. It will not lie for rent, because it is entirely in the realty; this is but a contract, there is no other remedy, for an heir cannot enter for a fine in his ancestors time; (he may, *per* HOLT, if it were forfeited and demanded) here the administrator hath brought the action as for a duty, and in an *indebitatus* for rent after a verdict, you have intended an actual promise. Debt lies for a relief in case of freehold, if like a relief debt lies, and if debt an *indebitatus*; where wager would lie in case debt were brought, an *indebitatus* will lie. In the case of *Howard v. Wood*, an *indebitatus* for the profits of an office; there they founded a contract upon a wrong: in the case of the Mayor and Commonalty of London v. Gory, an *indebitatus* was held to lie for *scavage money*; where money is due the law doth imply a contract: in the entry of admission it is *Dat domino pro fine*; there is a contract; this is the same.

HOLT Chief Justice. Suppose an executor of copyholder owed money upon bond, and paid this fine, and has not assets *ultra*, this would be a good plea to debt on a bond, so that it is more than a simple contract.

But *per* DOLBIN Justice, the bond shall be preferred.

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EYRES Justice. Debt lies for a copyholder's fine, and for *scavage* (a) and a stronger case than this is the case of the Lord North, 2 Leon. 179. for monies due for the value of a marriage, where the REGISTER gives a writ *de valore maritagij*: this is a sum in gross, a fruit fallen, a duty.

CHIEF JUSTICE HOLT. *Indebitatus* lies where *wager of law* will lie, but this seems of an higher nature, so that *wager of law* would not lie, if debt were brought. Debt lies for a relief by an executor because no other remedy. If an *indebitatus* lie, then it is of a lower nature than debt upon a bond. Debt will not lie for the rent arrear of a copyhold tenement: (but *per* LEVINS it will lie) (b) *Indebitatus* lies upon a personal contract for a sum in gross, as *pro rebus venditis*, or if a man grant his land for a year, and the party agrees to pay so much for it, this is a sum in gross, for which an *indebitatus* lies; but here both the custom and tenure appear, and it is of an higher nature, so as the action will not lie.

DOLBIN Justice. It is a sum in gross, and a duty for which the administrator of the heir to whom it was due upon the death of the lord, hath no other remedy but this or debt; and I think this lies for it is inferior to a bond.

See the case of
Grant v. Affle.
Doug. 727, and
731, 732. notes.

GREGORY Justice. After a verdict we must intend a promise, and then it lies.

EYRES Justice. I think the action lies, it being a fruit fallen, and a duty.

And so by three judges, judgment for the plaintiff, HOLT Chief Justice dissentiente.

(a) Mayor of London v. Gory, 2 Lev. 174, and see Carth. 92. where the case is cited as good law, Vent. 298. 398.

(b) See 3 Ann. c. 14. s. 4. and 21 Geo. 2. c. 19. s. 15.

Deighton against Greenville.

Case 35.

ERROR in the Exchequer Chamber upon a judgment in the King's Bench on a special verdict in an ejectment, tried at the bar here upon the demises of *Lord Huntingdon*, and *Lord Scarsdale*, and *Elizabeth Lewis*, of several, &c. which finds, as to the manors demised by *Lewis*, the defendants *not guilty*; as to the rest they find that one *Thomas Lewis* was seized in fee, and being so seized, the ninth of April, 20 Jac. 1. he acknowledges A STATUTE MERCHANT before the mayor of Lincoln, to *William Knight* in twelve hundred pounds; that in Trinity Term, 23 Car. 1. *Isaac Knight* executor of *William*, sued out a *capias* upon that statute, on which a *non est inventus* is returned, then takes out a writ to extend the lands of *Thomas Lewis*; on which the sheriff by inquisition did extend several lands mentioned in the inquisition, which are parcel of these in the declaration, and that the sheriff delivered these to *Isaac Knight*: That on the twentieth of November, 13 Car. 1. *Thomas Lewis* and *John Lewis*, enter into a recognizance in nature of A STATUTE STAPLE before Chief Justice BRAMSTON to *Richard Gerrard* for one thousand pounds; that *John Gerrard* the executor of *Richard* procured this recognizance to be certified * into Chancery, and thereon sued out an *extendi facias*, and had the lands in question extended and seized into the king's hands, which were afterwards, 24 Car. 1. delivered to *John Gerrard* by *liberate*. On the twenty-fifth of May, 15 Car. 1. *Lewis* enters into another recognizance to *Sir Jervas Ellwayes*, and *William Burrough* in five thousand pounds; that on the tenth day of December, 15 Car. 1. an extent was had thereupon, and afterwards by writ of *liberate* bearing *teste* the second of February, 15 Car. 1. and returnable in Easter Term following delivered to *Ellwayes* and *Burroughs*, that the manor of *Mair en Mair*, and five messuages, &c. parcel were purchased of one *Metham* by *Thomas Lewis* by fine and deed dated the twenty-first of December, 2 Jac. and find the deed and fine in *hac verba*: That before this purchase *Thomas Lewis* had the residue by descent from his father. That *Isaac Knight* and *John Gerrard* 1650, by their respective deeds, granted all their estates and interests by virtue of the said *extents*, upon the two STATUTES of *Knight* and *Gerrard* to one *Edward Lewis*, by virtue whereof he was possessed *prout lex postulat*; that *Edward Lewis* being so possessed, and *Thomas Lewis* so seized of the premises, and in actual possession thereof, *Thomas Lewis* by indenture the twenty-sixth May 1657, for four thousand pounds consideration conveys to *Sir John Lewis* in fee, and a fine levied in Trinity Term 1657, to *Sir John* with proclamations, and the last proclamation was the first May 1652. That at the time of this fine levied, the lands purchased of *Metham* were reputed to be parcel of the manor of *Mair*. That *Sir John Lewis* being seized, by will in writing devised the manor of *Mair*, and the other the premises in question to *Edward Lewis* his brother, and to the heirs males of his body, and for want of such issue to descend to his daughters *Mary* and *Elizabeth*, and mentions in his will, that these lands were at that time demised to *Edward Lewis* for life under a certain rent. On the tenth day of

If lands are extended on two statutes and the person who is seized of the land levies a fine it divests the estates of the cognizees of such statutes; and the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred.—But the cognizee of the second statute need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent; so that he will have five years from that time allowed him to avoid the fine, by the second saving in the 4 Hen. 7. c. 24. for until then his right did not accrue.

S. C. 2 Vent.
321. 333.
S. C. Comb. 50.
77.
S. C. 1 Skin.
260.
S. C. Cruise on
Fines, 218 to 225.
Cro. Jac. 156.
1 Vent. 241.
T. Ray. 219.
1 Lev. 52.
3 Kel. 37.
1 Atk. 571.

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August 1671, *Sir John Lewis* dies. That when *Sir John Lewis* his will was made, and at the time of *Sir John's* death, the lands in question were in possession of the said *Edward Lewis*, by virtue whereof he was seized *prout lex postulat*; that being so seized, in Michaelmas Term 23 Car. 2. *Eward Lewis* levies a fine *sur conu- zance de droit come ceo, &c.* with proclamations, the last proclama- tion was on the eleventh of January, 24 Car. 2. That this fine was to the use of *Edward Lewis* and his heirs. That *Sir John Lewis* had issue only two daughters, *Elizabeth* and *Mary* his heirs, and also heirs to *Edward Lewis*. That *Edward Lewis*, on the third day of September, 26 Car. 2. died seized without issue of his body; that *Elizabeth* and *Mary* being heirs to *Sir John Lewis* and *Ed- ward*, entred, and were seized *prout lex postulat*; That *Elizabeth* married * the *Earl of Huntingdon*, and *Mary* the *Earl of Scarfsdale*, and that they entred and were seized; and that *Elizabeth Lewis* widow, by virtue of an assignment from the executors of *Edward Lewis* after his death, being possessed of the benefit and interest of THE STATUTES to *Knights* and *Gerrards*, and the *extents* thereupon *prout lex postulat*, in trust to permit the *Earl* to take the profits thereof before the leases in the declaration, demised to the *Earls* at will. That the *Earls* being so seized, *Ellwayes* died, and *Burroughs* survived and died, on the first day of *May*, 30 Car. 2. and the admin- istration to *Burroughs*, quoad that STATUTE of five thousand pounds and the extent thereupon is committed to *Anne*, wife of the defend- ant *Bernard Greenville*. And the said *Earls* being so seized, on the thirty-first day of *July*, 32 Car. *Bernard Greenville*, and *Anne* his wife administrators *de bonis non administat* by *John Gerrard* of *Richard Gerrard* and *F. &c.* acknowledge satisfaction upon THE STATUTE of one thousand pounds to *Gerrard*, and pray that STA- TUTE may be cancelled and vacated, and thereon it is vacated and cancelled. That *Bernard Greenville* in the right of *Anne* his wife, as administrator to *Burroughs* did enter upon the *Earls*, and was pos- sessed *prout lex, &c.* That the *Earls* entred again upon him, and made the leases to the plaintiff, by virtue whereof he entred and was possessed *prout lex, &c.* That the defendant ejected him *prout, &c.* and concludes severally, &c.

THE CASE is no more than this.—*Thomas Lewis* being seized in fee of the lands in question, enters into A STATUTE MERCHANT to *William Knight*, afterwards acknowledges a recognizance in na- ture of A STATUTE STAPLE to *Richard Gerrard*, and then ac- knowledges another recognizance in nature of A STATUTE. *El- wayes* and *Burroughs*, they first extend, and have the lands delivered in extent. Then *Isaac Knight* executor of *William* extends, and hath the lands delivered by *liberate*, and *John Gerrard* the executor of *Richard* extends also, and hath the lands delivered to him by *liberate*.—*Isaac Knight* and *John Gerrard* assign their extended in- terests to *Edward Lewis*. Afterwards *Thomas Lewis* the conusor being in actual possession, levies a fine with proclamations to *Sir John Lewis* and his heirs, the last proclamation on the first of *May* 1658. *Sir John Lewis* by his will deviseth to *Edward Lewis*, and the heirs males of his body, and mentions in his will, that those lands were

were before demised to the said *Edward* for life, under a certain rent. *Sir John Lewis* dies, at the time * when *Sir John Lewis's* will was made, and at his death, the lands were in possession of *Edward Lewis*. *Edward Lewis* levies a fine with proclamations to *Francis Lewis*, to the use of himself and his heirs; the last proclamation was on the eleventh of January, 24 Car. 2. *Edward Lewis* dies without issue. *Sir John Lewis* had only two daughters, *Elizabeth* and *Mary* his heirs, and also heirs of *Edward*. *Elizabeth* and *Mary* enter, and were seized, and marry the lessors of the plaintiff. *Ekways* dies, and *Burroughs* survives and afterwards dies, and administration to him *quoad* his STATUTE, and the extent upon it is committed to *Anne* the defendant's wife. *Bernard Grenville*, and *Anne* his wife acknowledge satisfaction upon *Gerrard's* STATUTE, and that is cancelled. The defendant enters; the plaintiff upon him, &c.

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Whether the entry of the defendant in right of his wife as administrator to *Burroughs*, by virtue of *Burroughs's* extent was lawful or not, is the general question.

In the court of King's Bench judgment was given for the defendant. The plaintiff brings a writ of error in the Exchequer Chamber.

MR. TREVOR for the plaintiff. The particular questions in this case are several.

FIRST, Whether the fine levied by *Thomas Lewis*, he being then in actual possession, did divest all the extended interest upon the three STATUTES, and turn them to rights, and whether that fine, and five years non-claim do bar all those rights?

SECONDLY, Though the extended interests were not barred by that fine and non-claim; the next *quære* is, whether by the demise of the inheritance of these lands to *Edward Lewis*, who at that time had the extended interest upon *Knight* and *Gerrard's* STATUTES by assignment; these interests were not merged and extinguished in the inheritance?

THIRDLY, Whether (if so) *Burroughs* having a present right of entry by that merger, was not barred absolutely by the fine of *Edward Lewis*, and five years non-claim?

FOURTHLY, If not absolutely barred, yet whether he was not barred of such right as he had at the time of *Edward Lewis's* fine levied?

FIFTHLY, If so, whether any new right of entry be since accrued upon that extent, either by the acknowledgment of satisfaction upon *Gerrard's* STATUTE or otherwise?

* AS TO THE FIRST *quære*, the fine that was levied by *Thomas Lewis* being then in possession, hath divested all the extended interests, and turned them to rights, and the five years non-claim thereon hath barred all their interests, *Thomas Lewis* being then in possession. This fine worketh by way of feoffment, and consequently turns all estates to rights, by reason the fee simple passes to the feoffee, and so no estate can be left in any person else, and here the interests of the devisees upon the STATUTES, shall be divested and turned to rights, notwithstanding they had never actually entered;

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A fine and five years non claim bars the interest of a tenant by statute staple, before entry.

2 Co. 69.
Carth. 75.
Co. Lit. 237.
2 Vent. 329t

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for they had the possession in law notwithstanding by *the extents* and writs of *liberates*, and they had thereby a right of entry, and consequently shall be barred by the fine and non-claim; and so is *Saffyn's case*. (a) A man makes a lease for years of certain lands, to commence after the determination of a lease for years then in being; the first determines, the second never enters, but he in reversion enters and makes a feoffment, and levies a fine with proclamation and five years non-claim. In that case it was adjudged, That though the lessee had never actually entered; yet he should be barred by the fine and non-claim, because he had a right to enter, and such an estate in law as by the fine was divested: and there it was likewise resolved, That the interest of a tenant by STATUTE MERCHANT, STATUTE STAPLE, &c. should be barred by fine and non-claim: and so is *Isham v. Morrice*. (b) Lessee for years assigns over his estate in trust of himself, and afterwards purchases the inheritance, and continues in possession, and levies a fine, and five years pass; the interest of the assignee is barred, though he never actually entered. Devisee barred by fine, though levied before the devisees entry. (c) And so it was held in the court of Common Pleas, in Trinity Term, 28 Car. 2. upon a trial at bar there. That a tenant by *elegit*, should be barred by fine and non-claim, and that if an inquisition upon *an elegit* be found, the party before entry, has the possession in law, and a fine with non-claim shall bar his right, for before actual entry he may have *ejectione firmæ* or *trespass*; (d) and the case of A STATUTE STAPLE is the same where there is a *liberate* executed, for then the conusee hath a right of entry, or of bringing his action before an actual entry, and so shall be barred by fine and non-claim as well as tenant by *elegit*. (e) And as *Edward* who had the interests upon the two first STATUTES of *Knight* and *Gerrard*, shall be barred by this fine and non-claim for five years, so the same fine barred the interest of * *Elways* and *Burroughs* upon their STATUTE, which was the third and last.—And as to this point the case is thus: *Thomas Lewis* seized in fee, acknowledges A STATUTE to *Knight*, and afterwards acknowledges another to *Gerrard*, and afterwards another to *Elways* and *Burroughs*.—*Elways* and *Burroughs* extend their STATUTE first, then *Knight* extends, then *Gerrard* extends. *Edward Lewis* purchases the interests upon *Knight's* and *Gerrard's* STATUTES. *Thomas Lewis* levies a fine being in actual possession, and five years non-claim by any of the conusees, &c. Now this non-claim will bar all; for though *Edward Lewis* had the precedent statutes, and the interest of *Elways* and *Burroughs* was but a reversion, expectant upon the determination of those two precedent interests, yet these precedent interests being but chattels, and in nature of interests for years, and not freeholds, though *Elways* and *Burroughs* had no general right of entry at the time of the fine levied, yet they might have made an entry, or claim for this particular purpose, to avoid the bar upon the fine as well as he who had the

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(a) 5 Co. 123. Cro. Jac. 60. 3 Bac. Abr. 446. Cruise on Fines, 246.

(b) Cro. Car. 110. Hetley, 80.

(c) Hulm v. Heylock, Cro. Car. 200. and see the same case under the name of

Chamberlain v. Tanner, 1 Jones 195. 1 Eq. Abr. 209. Cro. Car. 129.

(d) Oguel v. Lord Arlington. 1 Mod. 217, 218. See also Cruise on Fines, 247.

(e) See Hannam v. Stephens, Post. 290.

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precedent interests, and shall therefore be barred by this fine and non-claim: and this is the same with *Margaret Podger's case*. (f) If lessee for years be ousted, and he in reversion disseized, and the disseisor levies a fine with proclamations, and five years pass, as well the lessor as the lessee is barred by the non-claim, and the lessor shall not have five years after the term for years expired, for he had a right to enter, and make his claim, notwithstanding the lease for years precedent; but it had been otherwise, if the estate precedent had been for life. So in this case, *Ekways* and *Burroughs*, who had the extended interests in reversion expectant upon the two precedent *extents*, those being but chattels, might within the reason of that case have entered, and made their claim, and therefore shall be barred for not doing so. In the case of *Stowell v. Zouch*, (g) it is said, If tenant for years, or tenant by STATUTE MERCHANT, or *elegit* be ousted, and afterwards a fine is levied with proclamations; that as well the tenant for years, or by STATUTE MERCHANT, or *elegit*, as he in reversion may enter upon the disseisor, as well as the particular tenant, which must be intended of an entry only to make a claim and revest the estate, and not of an entry to take the profits, for that cannot be done by him in the reversion, while the particular interests continue: so that thereby it doth * appear, that tenant for years as to this purpose is the same, and that he who hath an interest in reversion expectant, either upon a tenancy for years or by statute, ought to make his claim within five years after the fine, and shall not have five years after the lease for years, or extended interest determined; and if a reversion in fee shall be barred after five years non-claim, *a fortiori* an extended interest in reversion, which is but a chattel, and of less consideration in the law shall be barred thus.

* [42]

SECONDLY, Though these extended interests be not barred by the fine of *Thomas Lewis*, and five years after, by the devise of the inheritance of the lands in question, to *Edward Lewis*, who at that time had the extended interests in him of *Knight's* and *Gerrard's* STATUTES, these interests are merged and extinguished in the inheritance, and then *Ekways* and *Burroughs* are barred by non-claim in five years after that. Now these were merged, whether *Ekways* and *Burroughs* interests were a reversion intermediate between the precedent *extent* and the inheritance, or an interest *de futura* only. If it were a reversion, then that reversion was divested, and turned to a right by the fine of *Thomas Lewis*, and so continued to the time of the death of *Sir John Lewis*, there being nothing done that appears to revest it. When the freehold came to *Edward Lewis*, then the right which *Burroughs* had, could not prevent a merger of *Edward Lewis's* interest upon the two first statutes, upon the devise of the freehold to him, for then he had the immediate freehold, and the inheritance came to him by that will. *Burroughs* interest *in futuro* being no estate intermediate, but the *extents* upon these two first STATUTES must of necessity be merged and extinguished in the inheritance, so that either the *extents* upon *Knight's* and *Gerrard's* STATUTES were barred by the fine of *Thomas Lewis* and five years non-claim, or were merged and extinguished by

A fine and non-claim bar a reversion.

(f) 9 Co. 109.

(g) Plowd. 374.

DEIGHTON the devise of the freehold to *Edward Lewis*, or forfeited and deter-
 GREENVILLE. mined by the fine of *Edward Lewis*, which is the next point.

• [43]

THIRDLY, *Edward Lewis's* fine. *Burroughs* had a right of entry by virtue of his *extent* at the time of the fine levied, and therefore he ought to have made his entry, or claim in five years after that fine; this is much stronger than *Margaret Podger's* case, for there the fine was not levied by the lessee for years, so as to commit a forfeiture, or other extinguishment of the lease for years, whereby no absolute right of entry was given to the reversioner, but a right to enter by way of claim to avoid * the fine, yet that was such as that he had but five years after the fine; but here is an absolute right of entry accrued to *Burroughs*, not only a right of entry to have his claim to revest his interest, but a right of entry and taking the profits, and a right of action against any man that interrupts him; the particular estate is drowned, and it is more than where tenant for life or years levies a fine; it is a forfeiture, but determinable by the entry of him in reversion, which if he waives, he hath no right of entry till death of tenant for years. Now in this case *Burroughs* could not by waving his entry make these *extents* to have continuances, because they were actually determined, and *Burroughs* had at the time of the fine levied all the right of entering, or bringing actions that ever he could have, so that the acknowledgment of satisfaction upon *Gerrard's* STATUTES for the *extent* being determined before, could not again be determined. The right which *Burroughs* had at the time of the fine levied, was barred by five years non-claim after the fine, which was a present right of entry, by reason of the two first statutes being barred by *Thomas Lewis's* fine, or by the merger in the purchase of the freehold and inheritance of *Edward Lewis*, or upon forfeiture wrought by the fine of *Edward Lewis*; this cannot be denied, for being a present right it is barred. If tenant for life levy a fine, and he in reversion doth not enter, or make claim in five years; he can never enter for that forfeiture, but must stay till a new right of entry accrues to him by death of tenant for life. And so is *Plowd. Com.* 573. and *Cro. Car.* 201. Fine and non-claim bars devisee before entry, *Dyer* 133. Now the defendant had no other right than *Burroughs* himself had when *Edward Lewis's* fine was levied. No new right could accrue upon the acknowledgment of satisfaction upon *Gerrard's* STATUTE, for leaving *Knight's* out of the case, and none but *Gerrard's* and *Burrough's*, and *extents* upon them, and the extended interest upon *Gerrard's*, so barred by the fine of *Thomas Lewis*, and by five years, and the purchase of the inheritance, and fine of *Edward Lewis's* no new right of entry could arise to *Burroughs* upon acknowledging satisfaction, because that first *extent* was actually determined, and all the right that *Burroughs* could possibly have was accrued to him: this is after a threefold determination of the statute before: this is in no sort like the case of tenant for life levying a fine, that is no determination * of his estate for life, it is only a forfeiture which gives a power of entry, but till entry for the forfeiture the estate for life is not determined; but here the *extent* upon *Gerrard's* STATUTE was wholly and intirely determined before

• [44]

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v.
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fore satisfaction acknowledged. Then *Knight's* STATUTE and the extent upon that, stands in the defendant's way; for though in truth it be determined and barred as I have shewn, yet the defendant can take no advantage of that prior determination, because of the fine of *Edward Lewis*, and five years non-claim, so that as to the defendant, it is all one as though the extent upon *Knight's* STATUTE were actually in being: for that extent was as much determined at the time when *Edward* levied the fine, and therefore *Burroughs* ought to have made his claim within five years upon that: and if ever after he shall have any such right, he cannot pretend to it till *Knight's* STATUTE be satisfied by perception of profits, or otherwise receive some new determination; and then he cannot have a right of entry neither, but only a *scire facias*, for an extent upon a STATUTE shall not be avoided by entry but by *scire facias*, because a tenant by statute is to hold, not only till his debt and costs be satisfied which is certain, but till he be satisfied his reasonable damages and charges besides, which being uncertain must be reduced to a certainty by judgment of this court. Suppose there had never been any extent upon *Gerrard's* STATUTE, had the defendant's entry been lawful, or can he have any right by virtue of *Burroughs* extent, till some new determination of *Knight's* extent by satisfaction, or otherwise since the fine of *Edward Lewis*? Whatsoever determination there was of *Knight's* extent, it was either before the fine of *Edward Lewis*, or immediately wrought by that fine, and therefore whatever right of entry is in *Burroughs*, it ought to have been pursued within five years after that fine; now the acknowledging of satisfaction upon *Gerrard's* STATUTE can give *Burroughs* no better right, than would have been if here never had been any extent upon that STATUTE. Upon the whole matter, The extent upon *Burrough's* STATUTE was barred by the fine of *Thomas Lewis*, and five years non-claim, or barred by the fine of *Edward Lewis*, and non-claim after that fine; for when *Thomas Lewis's* fine was levied, *Burroughs* had, though not a general right of entry, yet he had a particular right of entry by way of claim to avoid the bar; and when *Edward Lewis's* fine was levied, *Burroughs* had an absolute right of entry * upon his extent; the two first extents being before that time barred, either by the fine of *Thomas Lewis*, and non-claim, or by the merger upon the will of *Sir John Lewis*, or by the forfeiture and extinguishment wrought by *Edward Lewis's* fine, and therefore he ought to have made his claim in five years, or is barred, or at least till some new right comes which is not yet: for the acknowledging satisfaction on *Gerrard's* STATUTE can give no new right, because the extent upon *Gerrard's* STATUTE was as much determined before satisfaction acknowledged as after. And besides, *Knight's* STATUTE stands in the way; for as to them the defendant *Knight's* STATUTE is still in being, though in truth it be determined; and the defendant can now take no advantage of it, because he, or *Burroughs* under whom he claims, suffered a fine and non-claim to incur after his right of entry upon that determination. But as to the lessors of the plaintiff, that extent is determined, because we claim under the fine and the other conveyances, by which it was extinguished; but however, though the extent upon *Knight's*

* [45]

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Knight's STATUTE be determined, as well in relation to us as to the defendant; yet the plaintiff must have judgment, for that the verdict finds priority of possession in the lessors of the plaintiff, and therefore they must have a good title against the defendant unless he hath a better.

See Some's case
3 Leon. 214.

Mr. BONYTHEN *é contra*. The fine levied by *Thomas Lewis* can never be a bar to us, till the interest of *Gerrard's* STATUTE were determined. The statute of fines, 4 Hen. 7. cap. 24. is express, saving their right to them which claim within five years; we had no right of entry till the first interest was determined, for if *Burroughs* had entred, he had been a trespasser, which is the best way of judging that there could not be an entry. He cited *Dyer* 3. 3 Co. 79. *Cro. Eliz.* 254. 220 *Moor.* 71. 9 Co. 160. the doubt of a fine levied by tenant for years, the same doubt was resolved, in Trinity Term, 23 Car. 2. Roll 1513. Easter Term. 3 Car. 2. *Baker v. Hodsdon*, the interest was not determined. *Vide Noy* 23. there must be five years after the determination of the first preceding interest. The interest of *Gerrard's* STATUTE did determine by acknowledging satisfaction, and not before; the interest of tenant by statute doth not determine by perception of profits till satisfaction acknowledged. He cited *Bro. tit. Stat.* 16. *Cro. Jac.* 694. *Jones* 238. *Co. Lit.* 289. *Fukwood's case*, 4 Co. 66. See these authorities.

• [46]

* POLLEXFEN *Chief Justice*. Can you prove that these interests are reversions, or that they can take advantage of a forfeiture, or are they like a future interest for years? Can you prove that the interests of statutes were ever taken as estates in reversion or remainder? Then supposing them reversions, if they are reversions for years, then they may be merged, and if you take them for remainders for years, then the coming of them one with another into one man's hands, there is no merger in this case, for then it is no more than a term for ten years, and a future term for twenty years, to commence after the first determines; supposing them as several reversions, then *Edward Lewis* is tenant for years, reversion to another for years; must not the reversioner enter in five years after a fine levied? If *Gerrard's* interest be barred, what can the entry of satisfaction do after? And certainly this fine did bar his interest. Suppose *Gerrard* had surrendered, would not that have determined his interest? Suppose lessee for life, remainder in fee: lessee for life is disseised, and a fine, and five years pass, the lessee is barred, and the remainder hath five years after the lessee for life his death. Can the remainder have five years if the lessee for life surrenders, or can he surrender after his estate is barred? If these *extents* are not reversions but like future interests, then when they come together in one man, that drowns both the terms, for there is nothing to keep them asunder. *Knight's* the first STATUTE is certainly barred: this was spoke upon breaking the case. *Sed adjournatur.* (b)

Ayliff

(b) S. C. Comb. 7. 82. says " *Quere* what judgment was given thereupon. S. C. 28kin. 26. reports only the case in the King's

Bench, where judgment was given for the defendant. But S. C. 2 Vent. 321. which reports only the argument of *YARLES J.*

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v.
GREENVILLE.
Case 36.

Aylyff against Scrimshaire.

This Term a loose Roll, BAKER Attorney in it.

DEBT on a bond. The defendant pleads a letter of licence to go abroad for seven years without molestation, and covenant not to sue him, and if he did that he should be discharged and released of the debt. Demurrer.

TREMAINE urged that this is a good plea, for a bond may be defeazanced, according to *Hedges v. Smith, Cro. Eliz.* 623. and the case of *Mackbeth v. Cobb*, where this was held good.

On the other side it was urged that it only was a covenant, and the words "shall be a release," amount to no more, and so is 21 Hen. 7. pl. 24.

HOLT Chief Justice. This is no defeazance: if it be a covenant perpetual, that is an absolute release; but if it be a covenant not to sue within a particular time; that is no release, and you must take the remedy upon your covenant; and so is 1 Roll Abr. 839. Cro. Eliz. 352.

And judgment was given PER TOTAM CURIAM for the plaintiff.

9 Co. 52. 2 Vent. 218. 3 Salk. 298. 12 Mod. 221. Ld. Ray. 419. 688. 4 Bac. 266. Comp. 819. 1 Term Rep. 93. 446.

A covenant by the obligee of bond not to sue the obligor for ninety-nine years, will not operate as a release or as a defeasance, and therefore cannot be pleaded in bar to debt on the bond.

S. C. 3 Danv. 437.
S. C. Salk. 573.
S. C. Comb. 123.
S. C. Carth. 63.
S. C. Holt. 619.
Post. 331.
Dyer. 28.
1 Roll Abr. 939.
Co. Lit. 264.
Cro. Eliz. 352.
619.
Salk. 575.
5 Co. 70.
Abr. 101, 102.

* [47]

Orbell against Ward.

Hilary Term, 3 & 4 Jac. 2. Roll 1018.

APPEAL of murder. The defendant comes in *in propria persona sua et per A. B. attornatum suum dicit quod*, there is no such parish as *St. Margarets*, &c. and to pleads a *misnomer* of the parish in abatement. The appellant demurs.

It was argued that the plea was naught, because by attorney, and because he had not pleaded over.

As to the last THE COURT held it well, because it is good either way; the appellee hath privilege of pleading over, if he pleases at S. C. Tremain 27. 2 Inst. 557. 1 Roll. Abr. 536. 1 Bac. Abr. 123. 2 Ld. Ray. 1290. 2 Hawk pl. 232

An appellee may, plead in abatement, and over to the felony, at the same time, or at his election may plead in abatement only.

S. C. Carth. 54.
S. C. Comb. 139.
S. C. 3 Mod. 266

in the Exchequer Chamber says "NOTICE. The judgment in this case, which was given in *Banc Regis* for Mr. Grenville the defendant was here reversed, and it is said, Cruise on Fines, p. 222. that this judgment was reversed by a majority of six judges against two: But the court of King's Bench refused to award execution because there was a mistake in the writ of error; upon which a new writ of error was

brought whereon the judgment was affirmed for Grenville, there being three judges for reversing, and three for affirming, and a majority being required to reverse the judgment, it was of course to stand. A writ of error was then brought in the House of Lords, and the judgment of the court of King's Bench was affirmed. See Cruise on Fines, 222 to 225."

the

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the same time, and he may not; the precedents are both ways. *Vide Cro. Eliz.* 695. 2 *Inst.* 313. *Co. Ent.* 56. *Bro. tit. "Appeal,"* 44-27. *Aff.* 3.

An *appellor* cannot plead even in abatement by attorney; but, if he do, it may be rejected as *surplusage*.

As to the other it was held by THE COURT, That it was a *discontinuance*, there being no plea at all, for a plea by attorney ought not to be received, and so the suit is discontinued; or else *per attornatum suum* is *surplusage*, and then it is well enough, and so a good plea, and this *quacunqve via data*, it is against the plaintiff.

S. C. 1 Salk. 59.
S. C. 3 Mod.
266.
S. C. Comb. 139.
S. C. Carth. 54.
S. C. Holt. 61.

And judgment was accordingly given for the defendant *PER TOTAM CURIAM*. *Vide Hesketh v. Lee*, 2 *Saund.* 95. "*per attornat.*" void.

S. C. Trem. 27. 2 *Inst.* 313. 2 *Ld. Ray.* 1290

Cafe 38.

Simpson against Merrille.

Michaelmas Term, Jac. 2. Roll 370.

In trespass justified by process out of an inferior court, it is sufficient to say that a *plaint* was levied and thereupon *taliter processum* *suit* the plaintiff should pay costs for his default, &c.

S. C. 2 Lutw.
1369.
S. C. N. Lut.
439.
S. C. Comb. 124.
S. C. Carth. 53.
Co. Lit. 303.
Hob. 226.
2 Vent. 100.
Lutw. 918.
1 Lev. 83.
2 Lev. 81.
3 Lev. 243, 404.
Carth. 53.
Show. Caf. Par.
94.
Cro. Car. 46.
Ld. Ray. 1530.
3 Com. Dig.
24 Pleader
(E. 18.)
1 Term Rep.
151.

TRESPASS for taking goods, &c. The defendant justified by a judgment in an hundred court, and process thereupon. The plaintiff demurs.

Mr. NORTHEY for the plaintiff, took divers exceptions to the plea, **FIRST**, That they ought to shew for what purpose the court was holden, and it is not enough to say a court holden.

SECONDLY, They say, the *plaint* was levied according to the custom of the hundred, and do not say *secundum consuetudinem Cur' præd.*

THIRDLY, They say there was a *plaint* levied in trespass on the case, *et taliter fuit processus*, that it was considered, the plaintiff should pay costs for his default, *unde convictus est*; this is ill, for in case of an inferior court, they ought not to plead it so, for that each part of process is traversable.

FOURTHLY, They say not, that the process was awarded * *PER CUR.* The suitors are set out to be the judges, and the process is under the seal of the steward, *et non constat*, that he had any thing to do with the court. (a)

FIFTHLY, Then as to the process they cannot have a *levari facias*, their process is *distress infinite* till satisfaction, they have no such writ: and so is 22 *Affiz.* 72. *Noy* 17.

THOMPSON. The law will take notice to what purpose an hundred court is kept. As to the *taliter processus* I know no reason for a difference between the mode of pleading in an inferior court and here; anciently all was set forth, now it need not, (b) if it is said

* [48]

(a) See the case of Canon v. Smallwood,
3 Lev. 203. and Matthews v. Cary,
Post. 61.

(b) D. Acc. by Ld. Mansfield, Cowp.
19.

according

according to custom, you'll intend it good: and as to the process it is said to be according to custom, and that shall be intended good unless the contrary appear.

SIMPSON
v.
MERRILL.

HOLT Chief Justice. At common law no *levari* can be; but the *quære* is whether it may be by *custom*, and now the practice generally is so. (c) As to the other point, in a case in my LORD HALE's time, it was held to be good, though only said *taliter fuit processus*, but here it doth not appear whether the non-suit was before or after appearance; if before, no costs; but yet if otherwise, you may have a writ of *false judgment*. (d) In this very point of *taliter processus* I was overruled in SIR FRANCIS PEMBERTON's time, and a year since in the Common Pleas. (e)

Then NORTHEY urged further, they say *unde convictus est*, which cannot be on a non-suit. *Adjornat'*. *Vide infra*.

(c) 3 Danv. 304. 2 Lutw. 1369. Nel. & Lut. 439. Carth. 53.

(d) Cowp. 20.

(e) It is now settled that this mode of pleading a justification to trespass for executing the process of an inferior court is sufficient. See Lilly Prac. Reg. 195.

Lev. Ent. 176. 2 Lut. 914; the case of Doe v. Parmiter, 2 Lev. 81. Higginson v. Martin, 2 Mod. 195. Mackreath v. Pollard, 1 Ld. Ray. 80. Murray v. Wilson, 1 Willf. 316. Adams v. Freeman, 2 Willf. 5. and Rowland v. Veale, Cowp. 18.

The King against Lewellin.

Case 39.

CONVICTION for a gun contrary to 33 Hen. 8. c. 6. The conviction was for having a gun in his house: The statute is, use to keep in his or her house, and perhaps it might be lent him, the words of the statute ought to be pursued. Conviction quashed.

See the cases of Avery v. Hoole, Cowp. 825. Rex v. Hunt, Dougl. 683. notis; and Boscawen's Treatise on Convictions page 26.

3 Mod. 280.

Jordan against Powell.

Case 40.

Easter Term, 4 Jac. 2. Roll 595.

CASE for labour and work as an attorney in suits, and for money laid out, &c. and an *insimul computasset*, &c. The defendant pleads the statute 3 Jac. 1. c. 7. (a) and that no bill or note had been delivered under hand. The plaintiff demurs. And urged, that in special action of the case such plea was ill; and so was *Eveling v. Lavermore*, Allen 4. * unless debt or *indebitatus* generally were brought, but an *insimul computasset* is out of the statute, and ill, and therefore ill as to the whole. Judgment for the plaintiff. (b)

The statute 3 Jac. 1. c. 7. may be pleaded to a general *indebitatus assumpsit*; but not to a *special promise* or to an *insimul computasset*.

S. C. Carth. 57. S. C. Comb. 126. Post. 96. 338. Dougl. 199. notis.

* [49]

(a) See 2 Geo. 2. c. 23. l. 22.

(b) The statute may be given in evidence on the general issue. Post. 338.

Unlton

Case 41.

Unston *against* Milner.*Easter Term, 30 Jac. 2. Roll 1010.*

An attorney cannot plead his privilege after *imparlance*.

ASSUMPSIT. Privilege of attorney of Common Pleas pleaded after *imparlance*, demurrer. Plea ill. Judgment for the plaintiff.

2 Roll Abr. 275.

Dyer 33. Stiles 295. 1 Lev. 54. 2 Shower 145. Hard 365. 1 Sid. 318. Lotw. 46. Comb. 68. Salk. 1. Dougl. 314. 1 Term. Rep. 278.

Case 42.

The King *against* Abraham and others.

The attorney general may file an information *ex officio*, for a riot.

INFORMATION in the attorney general's name against the defendant for a riot. Demurrer, because the information is not good, and there ought to be indictment or presentment.

2 C. Post. 106.
2 C. Holt. 361.
2 C. Comb. 141.

WINNINGTON, on the clamour of some of the house of commons at *informations*, &c. signed the demurrer, and argued thus: no man is bound to answer any criminal charge, unless upon *presentment* or *indictment*: he cited GLANVILLE, *cap. 1. Fleta lib. 2. cap. 52. fol. 112, 113.* MAGNA CHARTA, no man to be taken but *per legale judicium parium suorum*, 2 Inst. 46. 5 Edw. 3. c. 9. 25 Edw. 3. c. 4. 43 Edw. 3. c. 3. &c. and a great deal more which he particularized and answered in my argument in the case for the king, *vide infra*, page 106.

Case 43.

Hubert *against* Fitzgerald.*Hilary Term, 3 & 4 Jac. 2. Roll 414.*

In nullo est error is no admission of a fact that is not assignable for error.

ERROR. Special error assigned, that *John Styles* was returned a juror, and *Paul* sworn, *et in nullo est erratum* pleaded, that doth not admit the fact, because the *certiorari* was prayed and no return.

Yelv. 57. 2 Lev. 38. 1 Lev. 311. Cro. Jac. 521. 5 Com. Dig. "Pleader," (3 B. 18.)

Qy. If an ejectment for the town and lands of A. containing so many acres, be good.

Then ANOTHER ERROR was, ejectment for the town and lands of *Kildarley* containing one hundred and ninety acres; if it be not too uncertain, and ought to contain more particular quantities: if an ejectment will lie of a *villa terre*.

Owen 18. 11 Co. 55. Cro. Jac. 435. 654. 1 Lev. 58. 3 Leon. 210. 228. Cro. Eliz. 818. 854. Hard. 330. Stra. 71. 54. 1063. Annally's Rep. 127. 167. Ld. Ray. 1470. 1 Burr. 623. 5 Com. Dig. "Pleader" (2 Z. 7.) Dougl. 305. 1 Term. Rep. 11.

* Allen and his Wife *against* Grey.

Case 44.

*[50]

HOC TERMINO, *loose Roll*, WHITEHALL Attorney.

DEBT. The defendant pleads "*ne unques accouple en loyal matrimony*. The plaintiff demurs. Held an ill plea, because that puts it upon trial by *certificate*, which admits a marriage, but not *secundum leges ecclesiæ*. He should have pleaded "no marriage in fact," and that would have been tried *per pais*. Judgment for the plaintiff.

To debt by husband and wife the defendant may plead "no marriage in fact," but not "*ne unques accouple, &c.*"

S. C. Salk. 437. S. C. Comb. 431. Ray 395. 1 Lev. 41. 5 Bac. Abr. 227. Dougl. 171.

Jackson *against* Miles.

Case 45.

HOC TERMINO, *loose Roll*, CLARKE Attorney.

CASE upon an *assumpsit*. In consideration the plaintiff would do, &c. the defendant promised he would pay. The plaintiff avers that he did do, and shews no *place* where. Demurrer, and the declaration was held ill, because a consideration executory is transferable, and consequently *the place* needful, &c. Judgment for the defendant.

A declaration upon an *executory promise* not stating *the place* where it was performed, is bad on demurrer.

S. C. 1 Salk. 22.

Post. 78. 2 Lev. 227. 3 Lev. 311. Cro. Eliz. 73. 78. Lutw. 305. 1501. Cro. Jac. 503. Ray. 187. Stra. 595. 5 Com. Dig. "Pleader" (c. 20.) See 16 & 17 Car. 2. c. 8.

Kirle *against* Clifton.

Case 46.

Michaelmas Term, Jac. 2. Roll 21.

WRIT of error brought, error assigned, release pleaded; the plaintiff ought not to have judgment affirmed, because there appears to be error, though it ought therefore to be as a bar to the plaintiff, yet it ought to be a *nil capiat per breve*. Q. if any costs then for the defendant on error.

If a release of errors be pleaded, the judgment shall be *nil capiat per breve*.

S. C. Comb. 228.

S. C. 3 Salk. 214. 1 Salk. 268. and see the cases of *Cunningham v. Houston*, Stra. 127. and *Dent v. Lingwood*, Stra. 683. in point.

Cafe 47.

The King against Meeres and another.

If a person take a lodging-room by the week furnished, and has the key delivered to him, and runs away with the goods, it is not felony.

* [51]

INDICTMENT at the *Old Bailey*, on the sixteenth of May last, against *Mary Meeres* and *Susan Vicars*, for the stealing a rugg and other goods of *Robert Geery*: upon not guilty pleaded, a special verdict, that *Susan Vicars* and her husband lately deceased took a lodging room in the house of *Richard Geery*, furnished with the goods mentioned in the indictment from week to week, at two shillings per week; that the key of the door was delivered to the said *Susan*, which she kept; that *Susan* paid one * weeks payment for the room and lodging, and continued therein about four weeks: that the said *Susan* and *Mary* on the day in the indictment, and before the expiration of the fourth week took and carried away the goods. *Et si, &c.*

HOLT Chief Justice sent this cafe to **ME** and **Mr. NORTHEY** to argue for the prisoner.

And accordingly at *Serjeants Inn* I attended, and argued to this effect, that this is no felony. And here are two things considerable; what interest *Meeres* held in those goods; then what the law makes a felony, and so to apply both. Here is a good lease from week to week, at the will of both parties. The lodger hath a possessory right against all strangers; nay, against the landlord himself; if he come and take the goods out of the room an action of trespass will lie. The key of the room is given, which is more than a bare use such as a guest hath; this is an interest not determinable but at a weeks end. Here is an hire paid for it; and though the rent doth not in the eye of the law issue out of goods, yet it is reserved in respect and consideration of them, and the more is paid for them than otherwise would be, according to the cafe of *Dubytoft v. Courteen* (a), an eviction of tythes makes an apportionment of the rent; where a barn and tythes are let together, though the rent be issuing out of the barn only in point of remedy, yet it is issuing out of both, tythes as well as barn in point of render. The death of the husband is no determination of the estate at will, according to *Henslead's cafe*. (b) Then it is considerable, that in cafe of bailment of goods to keep, though the bailor hath an interest, yet the bailee hath one too, and such a property as to maintain a replevin, and so is 21 *Hen. 7. 15. pl. 23.* (c) Besides, if no interest pass, here is a possession by the delivery of the owner, and that is expressly found, and a separate possession by his consent, which will much affect the cafe when we come to consider what felony is by our law.—**SECONDLY**, What makes a felony concerning goods. According to

(a) Cro. Jac. 452.
(b) 5 Co. 10.

(c) Co. P. C. 102. Hale's Sum. 61.
1 Hale P. C. 504. 1 Hawk. P. C. 134.

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THE MIRROR OF JUSTICE (*d*), larceny is described to be the taking of any moveables *treacherously* against the will of the owner, by an unlawful gaining the possession of them; and then he says *taking* is a necessary contradistinction to *delivery*, and *treacherouslyment*, (which in the old books was the same with *felonically*.) Because, if the cloyner did apprehend the goods to be his own, and that he might well take * them, in such case, he is not guilty of this crime: nor where he apprehends that it pleased the owner he should have them; but of this (says he) there must be an apparent evidence and presumption. Now from hence I could infer, that in those ancient times, two things did excuse a *tortious taking* of goods from the guilt of larceny, *viz.* a contest or claim of property, and a taking in pursuance of such claim, and this is allowed by constant experience; or a delivery, or consent of the owner that the party should have them: now in either of these cases it is not a larceny, though the person hath not the true real property in the first case, but is mistaken; and though he do exceed, or out-do, and go beyond the authority of the owner in the latter case. To illustrate this, GLANVILL, *Lib. 10. cap. 13.* *Furtum non est ubi initium detentionis habet per dominum rei.* If there be such a consent of the owner, as argues his *trust* in me, and gives me a *possession* against all strangers, there my breaking that trust, or abusing that possession, though to the owners utter deceit of all his interest in those goods it will not be a felony (*e*), much less where I have a possession by his consent, and maintainable against himself, as in this case. And, according to GLANVILL, if a man lend me *rem suam ad usum inde mihi percipiendum in servitio meo*, the time being expired, I am bound to make restitution; but if I use it at another place, or beyond the time agreed on, I am bound to make amends (*f*), but *a furto excusatur per hoc quod initium habet detentionis per dominum rei.* PULTON *de pace Regni, fol. 129.* says, that the *intent* of stealing to make it larceny ought to be at the time when the party doth first come to the possession of the goods; though he hath an evil intent afterwards to convert them to his own use, it is not felony in him (*g*), for no felony is intended to be done but with violence, *vi et armis*, which cannot be supposed in this case, seeing they were delivered to him by the owner of them, and so he came lawfully to them: these are the words of the book (*h*): "A bare possession by the consent of the owner, nay, of one that is not owner, even of a wife, will make a taking not felonious; for if she deliver her husband's goods to a stranger, and he runs away with them, it is not felony (*i*). So is 13 *Affize* 6. In 12 *Affize* 32. if a forester cut trees, and leave them, and at another time come and carry them away, it is a *quare* if it be felony; much less ought it to be where the right owner gives the possession. In 3 *Hen. 7. pl. 12.* the case of a

(*d*) Chapter the first, Section 10.(*e*) Cases in Crown Law, 2d edit. 242.

327.

(*f*) See Sir William Jones's Law of Bailments.

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E

(*g*) Charlewood's Case at the Old Bailey, Feb. Sess. 1786. Cases in C. L. 317.(*h*) Hale's Sum. 64.(*i*) Harrison's Case. Cases in C. L. 44.

goldsmith,

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goldsmith, who had certain stuff in his custody to work, and embezzled it, it * was held no felony, because he could not be said to take it *vi et armis*, when it was in his possession by consent of the owner, and yet there the trust was to a particular purpose, and the conversion might be reckoned a determination of the privity as well as in our case. In 7 Hen. 6. 43. is an express case for me; if a man deliver goods to keep, or lend goods to another, he may commit felony of them himself; he hath but *jus proprietatis*, the bailee hath *jus possessionis*: So is *Gouldsbrough* 186. A servant or journeyman employed to sell goods and receive money for his master's use, sells a considerable quantity and receives one hundred and sixty guineas for his master, and goes away with one hundred and fifty when discharged, and lays the ten in a private place in the chamber where he lay; on being discharged his master's house and service, he afterwards, in the night time, breaks open the house and takes the ten guineas so hid; held no *burglary* in a special verdict, Easter sessions 1687, for that the taking the money was not felony, for though his master's money in right, yet his in possession, and the first original act is no felony: (and if he had laid it under-ground in the garden, and afterwards come and took it away, this would have been no felony, *per* WRIGHT, HERBERT, ATKINS, POWELL and HOLT, &c.) Now that was a tortious possession, our's was lawful; we could maintain trespass, or appeal for these goods, &c. Felony is according to the original intent, but then it must be found there was such an intent, and, in *favorem vite*, nothing is to be intended, or presumed against the party: there is nothing found of an *intention* to take away the goods when they took the lodgings (k), as there was in the case of suing the replevin, it was *ex animo*; and so is *Foorer's case* reported in *Sid.* 254. The form of indictments is considerable here; it must be *vi et armis*, &c. *felonice cepit* as well as *abduxit*, and unless it be so it is naught, excepting on the 21 Hen. 8. c. 7. where the *carrying away* is the felony, as the marginal note in the new *Dyer* 5. is, that the indictment in that case was only *felonice abcarriavit*, and in no other case is it good so: Suppose a man lease land with a stock of sheep, and the lessee sell them, or kill them, &c. that is no felony, and here we have the interest and possession both by the owners good-will at first. OBJECTION. The 13 Edw. 4. pl. 9. (l) a carrier having goods in a box sent to London carries them to Southwark, and there cuts open the bale, takes the money, and runs away; held to be felony, which perhaps was hard enough. I answer, in that very case it is agreed, that if they had been delivered to keep * by way of bailment, it had been otherwise; but besides, in that case, the authority was but for a particular place, then the carrying to Southwark determined the privity, and then the breaking open the box, and taking the goods might be felony (m); and it is there agreed, that if a servant have goods

* [54]

(k) 1 Hawk. P. C. 137.

(l) Co. P. C. 102. Staunf. 25. 1 Hawk. P. C. 134.

(m) Dalt. c. 102. 1 Roll Abr. 73.

Kely. 35. 1 Hale P. C. 505. 1 Hawk. P. C. 135.

to sell, or for any other particular purpose, it would not be felony, and that was the reason of making the statute of 21 Hen. 8. c. 21. for, at the common law, where the goods continued in the master's actual possession, it might be felony, otherwise not, because of the particular trust (n). Bailment to keep is no felony, *Dyer* 5. Here is a contract for the goods, if that be broken, no felony, because a contract at first (o). As to the objection that the *butler, cook or servant* who hath the bare charge of goods, may commit felony of them, 21 Hen. 7. 14. (p) I answer, if a bag of money be delivered to a servant to carry to *York*, or to buy horses with, it is no felony; it is out of the master's possession and in the servant's (q), and the reason given for that of a butler and cook in *Staunforde* (r), and in *Coke* (s) is, because they have not the *possession* but the *bare charge*; they are in *onere*, not in *possessione, prout con pistoris* says *Coke*; they cannot have trespass or appeal for them says *Staunforde*; which we may have. One that hath an horse lent him to ride on (t), or a weaver that hath cloth to work, no felony (u), and therefore embezzlement in some cases made felony. And as to that of a servant, it is the master's own possession, and therefore he may maintain an action for them, according to *Latch*. 127. *Poph.* 178. As to the OBJECTION, the 27 *Affize*, pl. 38. the case of a *guest* lodging in an inn who took the goods, &c. the same answer still; it is the inn-keeper's *possession*, and the party hath the *bare use* of them, as, and while in his possession who is, owner. Here is an express contract for *the goods*, as well as for *the room*; there is none but only for the meat and lodging: ours is more than a bare use, at least here is a possession, which could not be recalled as that of a guest might, and others used. On the whole I prayed judgment *pro prisonariis*.

Mr. NORTHY argued with me to the same effect, insisting chiefly upon the first possession by the owner's consent.

HOLT, Chief Justice of the King's Bench, thought it no felony.

POLLEXFEN Chief Justice C. B. thought it was, and that a lodger had the bare use as a guest hath, and that *feri facias* against the landlord would reach these goods, as is * the constant practice. That no *indebitatus* lay for the rent of the room, which shews the money was for the room and not the goods.

* [55]

ATKINS Justice was of opinion that it was no felony, and that the lodger had more than a bare use, and, now adays, lodgings furnished, and perhaps the greatest part of the house are taken by the year, and there is no difference in the time.

(n) Co. P. C. 105. 1 Hale P. C. 667.
1 Hawk. P. C. 138.

(o) 1 Hawk. P. C. 134.

(p) 3 Hen. 7. pl. 12. Bro. Cor. 58.
137. Moor. 246. Falc. 84. 1 Hale
P. C. 505.

(q) Staunford's Pleas of the Crown, 25.

(r) Book i. chap. 15. title "Larceny."

(s) 3 Inst. 108.

(t) 1 Sid. 254. Ray 276. 1 Hawk.
P. C. 136.

(u) 1 Roll Abr. 73. Kely. 35. 1 Hale
505. 1 Hawk. P. C. 135.

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v.
MILERS.

NEVIL *Justice*. No felony.

TURTON *Justice*. No felony.

ROKESBY *Justice* thought it no felony, because no *intent* found to *steal*, either in the taking the lodgings or in carrying away the goods.

VENTRIS *Justice* of the same opinion.

But ALL thought it a point deserving very good consideration (w). *Vide postea*.

(w) This question is now settled by the statute of 3 & 4 Will. & Mary, c. 9. which enacts and declares, "that if any person or persons shall take away, with intent to steal, embezzle, or purloin any chattel, bedding, or furniture, which by contract or agreement he or they are

" to use, or shall be let to him or them to
" use, in or with such lodging, such taking, embezzling, or purloining, shall be, to all intents and purposes, taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony."

Michaelmas

• Michaelmas Term,

• [56]

The First of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King *against* Cox.

Case 48.

SIR THOMAS COX of *Gloucestershire* appeared here upon his recognizance given before *HOLT Chief Justice* in the vacation; and an information being filed against him and others for riot, he was charged to *plead* to it as had been the practice. But upon debate it was said that he need not, and was not compellable, and was allowed to *appear* and *impart* till the next term,

If a defendant appear in R. R. upon recognizance on an information for a riot filed against him, he need not *impart* till next term.

2 Salk. 514. 3 Mod. 215. 1 Salk. 367.

Dove against Martin and another.

Case 49

CASE against two executors; one dies after issue joined before trial: a verdict for the plaintiff. It was moved in arrest of judgment, that the suit is abated. *Quere* if abated *ipso facto*, or only abateable by plea. Agreed to be error assignable. (a)

The assise one defendant arrested before trial by error.

Cro. Car. 509. 1 Sid. 131. 3 Leon. 5. 1 Leon. 27. 2 Ld.

(a) See the 17 Car. 2. c. 8. and 8 & 9 Will. 3. c. 19.

Cafe 50.

The King against Machin, Burchet, and others.

The Chief Justice in Eyre cannot grant a warrant to apprehend a person for having killed deer and destroyed trees in one of the king's forests, on evidence that part of the property was found on his premises; but the offender may be apprehended if discovered in the *mainour*.

* [57]

THE DEFENDANT, being taken by a messenger of the LORD LOVELACE's, Chief Justice in Eyre, by his warrant to bring him before him where he should be, was charged upon oath for killing deer and cutting down young trees, some of the trees being found in one of their yards.

PEMBERTON Serjeant moved for their discharge, for that no warrant can be granted upon oath; but upon a presentment of the verderors an attachment lies. Manwood saith, There must be a presentment before there is a warrant; here the warrant is to bring them before him wheresoever he be. BY CHARTA * DE FORESTA, 9 Hen. 3. c. 8. no man is to be taken for *vert* or *venijon*, but upon indictment or presentment, (a)

TREBY Attorney General. Here they are taken in the *mainour*; the wood and timber which they cut is found in their house and yard. The preamble of the statute takes notice of persons kept in custody by *foresters* and *regarders*, but nothing is mentioned of the Chief Justice, but only of ministerial officers. (b) In case of *asserting*, the party is to be taken presently. The ordinary ministerial officers cannot do it; but THE CHIEF JUSTICE, who is a supreme judicial officer may. It is to be compared to a constable and justice of peace at common law: a Chief Justice may take a recognizance or commit, even out of the forest, 1 *Rolls Abr.* 534.

THE COURT. He may be apprehended if taken in the *mainour*: it is but an incroachment on the common law for justices of the peace to grant warrants before presentment or indictment; (c) the court of *attachments* (d) is in being, though the *swainmote* is not, &c. (e) The words of the statute are general, "No man shall be taken or imprisoned;" the words are general, it is a general law. As to the *mainour* he must be taken in it: the Chief Justice cannot send to take in the *mainour*, for the *mainour* must be at the time when the thing was done or committed; for if the goods were found about him afterwards, that is not a taking in the *mainour*; for he might buy them, or another leave them there, &c. (f) The warrant ruled to be void, and they were all discharged PER CURIAM.

(a) See the Register 80. F. N. B. 67. the Statutes of 1 Edw. 3. c. 8. 34 Edw. c. 1. 7 Rich. 2. c. 4. 4 Inst. 313. and 3 Bl. Comm. 73.

(b) See Manwood on Forest Law, chap. 9. number 4; and Crompton's Jurisdiction of Courts, title "Justice in Eyre."

(c) This is the notion of Sir Edward Coke, 4 Inst. 176. and the practice is said by Hawkins to be grounded rather upon connivance than the express rule of law. 2 Hawk. P. C. 132. But Sir Matthew Hale

is of opinion, that a justice of peace has power to issue a warrant to apprehend a person accused of felony though not indicted, 2 Hale P. C. 108. and this practice seems now by long custom to be established, 4 Black. Com. 287.

(d) See 3 Bl. Com. 71.

(e) See 4 Inst. 289.

(f) See 2 Hale P. C. 149. 3 Bl. Com. 71. 4 Bl. Com. 303. 2 Hawk. P. C. ch. 15. § 41. Carth. 79.

Brookes against Cooke.

Case 51.

DEBT upon an escape against the defendant as marshal, setting forth a judgment recovered by her as executrix, and the party in execution, and let at large. Fresh pursuit pleaded. Verdict for the plaintiff.

Moved in arrest of judgment, That the plaintiff had brought the action in the *debet* and *detinet* in her own right, whereas the recovery, which is the foundation of the action, was as executrix. That the action for the escape ought to be brought in the same right, it being of the same nature and kind, and a remedy which the law gives her to have satisfaction upon that recovery* which she had as an executrix, and this course is an inverting of the nature of the administration. *Sir George Reynell v. Langcastle, Cro. Jac. 545.* is exprefs that this money will be assets.

THOMPSON *è contra.* This is brought upon a judgment by her, and an execution upon her suit, and therefore her own. Besides, it is helped by the statute of Jeofails, and so is *Frewen v. Pope, Sid. 379.* Debt, for rent upon a lease of the testator, in the *debet* and *detinet*, helped after verdict, and *Comber v. Wotton* in *Sid. 342.* Action against an heir in the *detinet* only, aided by the verdict and the statute of Jeofails, 16 and 17 Car. 2. c. 8. (a)

HOLT Chief Justice. Where an executor brings an action in the *debet* where he ought not, it is helped by the statute 16 and 17 Car. 2. c. 8. But the *quære* is, whether this action be brought as executor, or in her own right? If this be so, and remains uncertain, it will remain uncertain still, whether this judgment be in her own right or not. In case of *trover* or *trespass*, if it appear the wrong was in her own time, though she be called *executrix* in the declaration, yet it might be in her own right; so here it appears uncertain.

DOLBEN Justice. If an executor bring debt and recover, and then an escape of the party, the suit for the escape must be as executor, and so it is agreed in the case of *Holman v. Chute, Cro. Jac. 685.* And *PER CURIAM* judgment was arrested. (b)

(a) See also 4 & 5 Anne, 16. it is aided on a general demurrer, *Ld. Raym. 1513.*

(b) But the law in this case and of those cited in the margin to the same effect, seems to be denied by the case of *Crawford v. Whittel, Dougl. 4.* note (1), where the plaintiff in an *indebitatus assumpsit* declared that the defendant was indebted to him as administrator, and on demurrer one objection was that there was no *profert* of the letters of administration; but the court said that *profert* was unnecessary, because in this action the plaintiff had no occasion to have described himself as administrator; and by the case of *Bonafous v. Walker, 2 Term Rep. 126,* which was an action of debt against

the marshal for an escape, on the trial of which it appeared that the prisoner had been taken in execution on a judgment obtained against him by the plaintiff as *administratrix* of the husband. On a rule for a new trial it was contended on the authority of *Waite v. Briggs, 1 Ld. Ray. 35.* that the action ought to have been brought by the plaintiff as *administratrix*, but *THE COURT* denied that case to be law, and said the instant the plaintiff recovered the judgment, it became a debt due to her on record, and was assets in her hands; for which it was not necessary to declare as *administratrix*.

An action on an escape from execution on a judgment obtained by the plaintiff as *executrix* must be brought by him as *executor*, and not in the *debet et detinet* in his own right. *Qu.*
S. C. Comb. 114.
S. C. Carth. 49.
S. C. Holt. 96.
5 Co. 31.
Cro. Eliz. 326.
Savil. 130.
C. o. Jac. 546.
Lane 79.
Hutt. 79.
Styles 232.
1 Lutw. 893.
1 Ld. Ray. 35.
5 Com. Dig.
"Pleader"
(2 D. 1.)

* [58]

If an action brought in the *debet et detinet* and it is uncertain whether it ought to be in the one or the other, it shall not be amended.

8 Co. 159.
Hutt. 57.
1 Roll. Abr. 199.
Stra. 401.
Dougl. 113.
notis.

Case 52.

Salter against Kidley.

Trinity Term, 1 Will. & Mary, Roll 394 or 349.

In articles of agreement executed between A. and E. whereby A. lets a house to E. and E. agrees to pay the rent; if B. a third person covenant there-in for himself &c. on behalf of E. that the said E. shall pay the rent, and sign the deed, an action of covenant, on non-payment by E. will lie against B.

S. C. Carth. 76.
S. C. Holt. 210.
Cro. Eliz. 212.
905.
Co. Lit. 229.

231.
2 Roll. Abr. 22.
1 Salk. 197-214.
1 Com. Dig.
"Fait" (c. 2.)
Douglass. 27. 766.

* [59]

In an action of covenant for non-payment of rent stating that A. held from M 13 to 15 April anno proximo, a breach assigned that the rent was in arrear *ad decimum quintum Aprilis* is good.

Moor. 40.

5 C. 1. 1. 90. C. 3. Jac. 135. 258. 1 Bull. 177. 3 Bull. 204. Co. Lit. 46. Stiles, 118. and see the case of *Dugh v. the Duke of Leeds*, Cowp. 714. that the word *from* may mean either *inclusive* or *exclusive*, according to the context and subject matter, and the court will construe it so as to effectuate the deeds of the parties.

COVENANT on a deed, reciting certain articles made between A. and E. and that one B. should perform all that on his part were to be performed, and that these articles were made between A. and E.; but by that deed B. did covenant and agree to pay, &c.; that B. did not pay; and that the defendant hath not paid; *et sic infregit*. Demurrer.

It was argued, That B. was no party to that deed, and so not bound, though he sealed it; and it doth not appear that B. sealed it but by way of recital, which is no estoppel. *Vide Cro. Jac. 359. Cro. Eliz. 56. 2 Inst. 673.* That in case of an indenture between parties, none are bound but the parties.

THOMPSON *à contra*, cited 40 Edw. 3. pl. 5, that in a deed, (and *non constat* by the book, whether poll or indented) if there be a covenant by another man, and he seal it, he is bound. *Fitzh. "Obligation"* 16. though the words are the words * of the lessee, yet if the lessor seal, he is bound.

HOLT Chief Justice. This doth not appear to be an indenture, it is "*per quoddam scriptum fact.*"

LEVINZ. Though not an indenture, yet if it be between parties, it is the same thing as to this, and none are bound but the parties. Those old cases which THOMPSON cites are all of deeds in the first person; and then I agree, if it be, "I A. do oblige myself," and at the end, "I B. do promise, &c." and both seal, both are bound. There may be several deeds upon one parchment. But this cannot be so, for this is thrust in the midst of all the covenants; this can never be taken to be a several deed; and therefore B. being not bound, we are not bound, for we are only to perform what he was obliged to perform, and *non constat*, but in the recital, that B. sealed, and a recital in an indenture is no *estoppel*, though it be in the condition of a bond. *Co. Lit. 352.*

LEVINZ. There is another fault; it is, B. held the lands from the said 13th day of April to the 15th of April, *anno proximo*, and a breach is assigned in non-payment of rent arrear *ad decimum quintum diem Aprilis*: it was FROM the thirteenth, so that it began upon the fourteenth, and then it ends the fourteenth, for there cannot be two fourteenths in one year.—ANSWER. If it had been *debit for rent*, it might have been ill, but in *covenant* to say it was arrear is well enough (*quære differentiam*) and "*finis ad*" is exclusive.—LEVINZ. Supposing "*ad*" exclusive, that will not help it, for the year ended the thirteenth.

HOLT

HOLT Chief Justice. Why, cannot a man oblige himself by a deed, if there be exprefs words for it, and he seals it? Suppose at the end of an indenture it be, "And be it known unto all men, "That A. B. for himself covenants, &c." and he seals it, why should not this oblige him? A man cannot take immediately where he is not a party; but where do you find that a man cannot give without being a party? In a deed of feoffment, a warrant of attorney to A. not a party is good now, though formerly held to be otherwise. General recital is not an estoppel, but a recital of a particular fact is so. 1 Saund. 8. 1 Inst. 52. *Adornatur. (a)*

SALTER
v.
KIDLEY.

(a) THE COURT was clear in opinion ant upon this deed, S. C. Carth. 77.
that the action did lie against the defend- S. C. Holt. 211.

* Whitmore against Manucaptors of Wheeler.

Cafe 53.

* [60]

SCIRE FACIAS returnable *die Lunæ post quindenam trinitat'*. The defendants plead in abatement, That *quindenam trinitat'* is held on Monday, and so it should have been in *quindenam trinitat'*. Demurrer.

A *scire facias* returnable on Monday after fifteen days of the Holy Trinity is good, when the proper return is on Sunday.

PER CURIAM held well enough, because the Sunday is the proper return-day, and so *Lunæ post* is well enough.

But, by TREMAINE, in *Rodd v. Evans (a)* in this court, a writ held ill because so returnable, in the case of a sheriff's bond.

6 Mod. 268.
Bunb. 318.
Stra. 811.
Ld. Ray. 1528.
2 Burr. 1187. 3 Term Rep. 642.

(a) 3 Keb. 260.

Bosworth against Ringole.

Cafe 54.

Trinity Term, 1 Will. & Mary, Roll. 394.

IN a scire facias, letters testamentary ought to be shewn at the end of the writ, if brought on a judgment recovered by a testator.

Profert.
S. C. Carth. 69.
But see Ante.
page 58, note
(b)

Young against The Hundred of Tedcombe.

Cafe 55

ACTION upon the statute of HUE AND CRY, and, after verdict, excepted in arrest of judgment, That the robbery is laid to be S. "prope quendam locum vocat' FOUR MILES GATE *infra hundred' præd' in com. DORSET præd'.*"

An action on the statute of HUE AND CRY is good after verdict although it do not directly aver the place where to be within the hundred.

And so not certain that the robbery was in the hundred; for it might be out of the hundred, and yet nigh a place within the hundred.

Hutt. 125. Noy. 155. 1 And. 159

But

YOUNG
v.
HUNDRED OF
TEDCOMBE.

A declaration on the statutes of MUR AND CRY is good after verdict though it do not allege that the robbery was in the high-way.

S. C. 3 Mod.

258. S. C. Comb. 150. S. C. Carth. 71. 2 Leon. 175. 11 Mod. 8. 1 Mod. 221. 7 Mod. 159. Owen 7. Salk. 614. 3 Com. Dig. "Hundred" (c. 2.) 1 Will. 412. 437. 2 L.J. Ray. 828. 2 STRA. 1011.

(a) 1 Sid. 263. 7 Co. 6. Stiles, 233. Cro. Eliz. 270. 735. Cro. Jac. 106. Moore 620. 1 Leon. 57.

But PER CURIAM *infra* hundred^d shall refer to both; besides, it is after a verdict.

ANOTHER EXCEPTION, That it doth not say it was in the high-way. THE COURT. The law is, That it must be in the high-way, and otherwise they could not have had a verdict; but this is laid according to the statute, and the precedents in *Rastal* and *Coke* are accordingly without mentioning any thing of a high-way. Besides, it must in this case be in the day-time, but it need not be averred in the declaration that it was in the day-time. (a) Judgment for the plaintiff.

Case 56.

* [61]

A writ of enquiry returnable on a day out of term is bad.

S. C. Carth. 70.

The writ may be amended by the roll; and the roll by the writ.

S. C. Carth. 70.

Cowp. 425. 841. Dougl. 376. 730.

* Hammond *against* Purfell.

WRIT OF ENQUIRY awarded, returnable "*die Veneris prox^o post crastino ascensionis*," which is out of term, whereas it should have been "*in crastin*." held ill.

But moved to be amended. PER CURIAM not amendable, for if the award were right, they would mend the writ and return by it; or if the writ were right the award might be amended by it. But both being so, held ill, and not amendable.

Case 57.

Matthews *against* Cary.

Easter Term, 3 Jac. 2. Roll 320.

In trespass, for taking a cup, under process from a court leet it is sufficient to justify the officer that there was a presentment upon which the process issued; for the presentment is not traversable.

S. C. 3 Mod.

137.

S. C. Carth. 73.

S. C. 3 Salk. 52.

S. C. Holt. 408.

S. C. Comb. 76.

Skin. 587.

(3 K. 27.)

TRESPASS for breaking and entering his house and taking a silver tankard, and detaining it till he paid five pounds. The defendant pleads, that the plaintiff was presented for a nuisance, and upon that presentment was amerced five pounds, and that the defendant took it by warrant from the Dean and Chapter of Westminster, whole the leet was, &c. The plaintiff replies *de injuria sua propria* ABSQUE HOC that he was guilty of the nuisance. The defendant demurs.

BONYTHON. The presentment is not traversable, (a) and so is 5 Hen. 7. 3. 41 Edw. 3. 26. Bro. tit. *Presentment en court*, 1. 5. 45 Edw. 3. 8. It is enough to justify the officer from being guilty of a trespass, that there was a presentment and amercement, and whether true or not is not for the officer to consider.

Cro. Eliz. 885. 1 Salk. 107. Fitzg. 46. 108. Stra. 847. 5 Com. Dig. "Pleader"

(a) Rex v. Roupel, Cowp. 458.

THE

THE COURT. In *trespass* it is sufficient to justify the officer that there was such a presentment, because this action tries the authority, whereas in *replevin* the suit is not so much for damages as to try the right, and there it is not enough to set out an authority as to make out the right.

THOMPSON. They have not said *per mandatum* of the steward, for in *trespass* they cannot justify without a good authority, and that the steward only can give. In *Wilson v. Hardingham*, *Hob.* 129. it is by precept, *Cro. Eliz.* 698. *Per* PUPHAM a bailiff cannot distrain without a warrant; but by GAUDY he may; but that was in *replevin*: but here the defendant is not said to be the lord's bailiff. *Vide* *Moore* 847. *per mandatum* of the constable necessary, *Mis e* 573. a precept is necessary.

BONYTHON *è contra*. Good without a warrant from the steward; it is a duty for which the lord may distrain * or bring debt. If it be lawful for the lord to distrain, it will be good when his servant does it: here is an interest vested, and surely the lord may distrain without leave from the steward. In the earl of *Bedford's case*, (b) in an *avowry*, is no precept. In 26 *Hen.* 8. 8. no need of a precept. In *Gregory's case*, (c) no mention of any warrant. In *Godfrey's case*, (d) is none.

COURT. In an *avowry* as bailiff to the lord you need not; but in *trespass* you are there to justify your authority, and that must be by warrant from the steward. Upon the presumption that all persons are present in the leet, was the old reason why it was not traversable. (e) *Vide* *Cro. Eliz.* 187. 3 *Leon.* 8. *Moore* 75. He must alledge the truth of the fact, and the estreat drawn out, or warrant. The steward cannot amerce: Antiently two were sworn to *affere*; now the same jury do both; but the jury may not amerce, certainly, without any afferment; the judgment is *quod amerciatur*, then the jury ascertain it. (f)

DOLBIN Justice. You ought to say there was such an offence committed, and a presentment.

HOLT Chief Justice. You need not in *trespass* where you do justify. *Stephens v. Hayes*, *C. B.* 30 *Car.* 2. (g)

DOLBIN Justice. If you justify out of the admiralty court, must you not say, it was *infra jurisdictionem*?

HOLT Chief Justice. No, you need not, because perhaps there was no cause of action; they must alledge, that it was not (b) but *avowry* goes to the right whereas *trespass* doth not. (i) In an

MATTHEWS
v.
CARY.

A plea of justification in *trespass* under process of a court leet, the defendant need only state the authority under which he acted, viz. by warrant from the steward; but in an *avowry* the right under which he acts must be shewn. *Cro. Eliz.* 698. 748. 885. *Skin.* 587. *Carth.* 74. 3 *Leon.* 8. 1 *Salk.* 107. *Fitzg.* 46. 103.

Str. 847. 1184. 5 *Com. Dig.* 338. *Ld. Ray.* 309. 1100. 1530.

* [62]

(b) *Cro. Eliz.* 14.

(c) *Co. Ent.* 119. 8 *Co.* 67.

(d) 11 *Co.*

(e) *Rex v. Roupel*, *Cowp.* 458.

(f) *F. N. B.* 75. 1 *Roll Abr.* 542.

3 *Lev.* 206. *Andr.* 47. *Str.* 847. 4 *Com. Dig.* 176.

(g) See the case of *Stephens v. Haughton*, *Str.* 847.

(b) See the case of *Rowland v. Veale*, *Cowper* 18. and *Trevor v. Wall*, 1 *Term Rep.* 151.

(i) *Blunt v. Whitaker*, 1 *Leon.* 242.

MATTHEWS v. **CARY.** avowry the command is not traversable, but where you justify a trespass you need not aver the thing but the authority. (k)

HOLT Chief Justice, and **EYRES Justice**. The amercement ought to be the act of the court, and the affecting to be by the jury; the jury cannot amerce: the case of *Wilton v. Hardingham* in *Hobert* 129. is not law.

DOLBIN Justice. The jury do amerce, and there are affectors particularly for that purpose appointed.

If the jury amerce (says **HOLT**) to a particular sum, then there is no need of an affectment.

DOLBIN Justice. For want of a warrant the plea is ill.
And so **PER CURIAM** judgment for the plaintiff.

(k) *Raft. Ent.* 606. *Thomp. Ent.* 311. 346. *Cro. Eliz.* 385.

Case 58.

* North against Carroth.

* [63]

HOC TERMINO lose Rol!, **G. WOOWARD Attorney** in it.

A statute pleaded to have been at a parliament held at such a time by *prorogation* is good.

1 Lev. 296.
2 Mod. 242.
Moor. 551.
12 Mod. 602.
Ld. Ray. 210.
343.
Doug. 97. *notis*.

THE same case and the same rule; but only two exceptions more were taken to it. They plead an act of parliament held *die Eliz. per prorogat'*.

Ill, because that was the first day of session, though they were by writ called on a former day, and without sitting ordered to that day, *Dyer* 203.

PER HOLT Chief Justice. It is well enough, for it was a parliament held by prorogation that day; though according to *Dyer* it would be ill to say held the first day, and continued by prorogation, for they never met and yet were prorogued.

A corporation need not shew in what right it is seized. —

Plow. 103. 10 Co. 34. 2 Lev. 68. 1 Leon. 153. *Cro. Eliz.* 232. 5 Com. Dig. "Pleader" (E. 22.) *Doug.* 149.

ANOTHER EXCEPTION was, They say that the abbot and convent were seized, whereas it should be the abbot in right of his convent.

Case 59.

Stephens against Etterick.

After a writ of enquiry executed and returned the plaintiff cannot *discontinue* without the defendant's consent, although the return be not filed.

COVENANT. Writ of enquiry awarded, executed, and returned, but not filed.

SIR FRANCIS WINNINGTON moves to discontinue. *Quer.* If it could without consent of the defendant: he urged that it might with leave of the court. This judgment is but the award of an enquiry; it is an interlocutory act of the court; there is nothing reduced to a certainty; it is a direction of the court more than a

S. C. Comb. 170. *S. C. Carth.* 86. *S. C. Holt.* 155. 1 *Roll Abr.* 487. 2 Lev. 124. 209. *Barnes* 170. *B. R. H.* 194. 1 *Bull.* 217. 1 *Salk.* 178. *Str.* 76. 216. 3 *Burr.* 1451. 4 *Burr.* 1927.

judgment;



judgment; death of one or another abates the suit; in case of a special verdict it may be. *Earl of Oxford's case*, Cro. 79. 93. 1 *Saund.* 30, 37. Where the writ is abateable by the death of the party, it is discontinuable by the plaintiff.

STEPHENS
v.
ETTERICK.

Mr. CRISPE *à contra*. A continuance is where both parties, have a day to appear. A discontinuance is where the party is put out of court, because he doth not appear. He cited *Rastal* 144. 1 *Sid.* 14. *Dyer* 195. Here is no opportunity, for here is no *dies datus*.

CURIA. In *Roll's Abr. tit "Contin."* is this very question put upon a verdict, and held he cannot. Here is no difference; here is a judgment by *Nilil dicit*, and an enquiry awarded and returned. If the plaintiff will not enter a continuance, the defendant may in this case. DOLBIN. He cannot discontinue without consent, and so ruled PER CURIAM.

* Palmer against Keblethwaite.

Cafe 60.

Easter Term, 36 Car. 2. Roll 448.

* [64]

CASE. The declaration states, That the defendant did maliciously throw down, and break a great part of an ancient dam, whereby he did divert a great part of the water of the said river *quæ currere consuevit et debuit* to a mill of the plaintiff. The defendant pleads, That the place where the dam stood was the defendant's soil; that by means of that dam the water run to a mill of the defendant's, and so to the plaintiff's; that the defendant's mill fell down, and so the water was diverted. Demurrer. Plea agreed ill.

In an action for diverting a watercourse it is sufficient to say *quæ currere consuevit et debuit* to the plaintiff's mill, without shewing any other title; for possession is sufficient title against a wrong doer.

Argued that the declaration was ill, because it doth not prescribe for this water-course nor doth he say it was an *ancient mill*, so that it doth not appear to be matter prescriptible; all that is under the *per inde* is no expression of the ancientness of the mill. (a) Surely it is not enough to say he was seized of a piece of land, and the water run thither, with a *per quod*, he lost the water that run thither: this is no more than if he had no ancient mill.

S. C. 3 Mod. 48.
S. C. 3 Lev. 123.
S. C. Carth. 84.
S. C. Comb. 9.
S. C. Skin. 65.
175.
S. C. Holt. 5.
Ante. 7. 13.
Post. 35c.
1 Vent. 319.
275.
2 Vent. 292.
T. Jones 157.
Cro. Jac. 43.
123.
Cro. Car. 500.
375.
Owen 109.
4 Mod. 423. 175.
3 Lev. 266.

PER HOYLE, If there be a good cause of action laid in our declaration, it is with the plaintiff: if there be an injury done by the defendant to the plaintiff, and damage accrued to him by it, the action lies: (b) here is both: Now where the action is brought upon the prescription or right, it must all be prescriptible; but where the declaration is upon the *possession* against a *wrong doer*, there we need not say that it was time out of mind. (c) I rely upon the case of *Eden v. Marche*, in *Palmer* (d) and Mr. JUSTICE

3 Lev. 148. Lutw. 120. 1 Leon. 247. Skin. 316. 12 Mod. 100. 151. Stra. 1004. 248. 488. 1 Burr. 440. 4 Bac. Abr. 15. 1 Term Rep. 428. 3 Term Rep. 768.

(a) See the case of *Rastal v. Hanford*, 1 Leon. 273.

(b) See *Bracton*, b. 4. c. 3. and *Lutwul's case*, 4 Co. 86.

(c) Cro. Car. 499. 575. Palm. Rep. 200. Ante, page 7, case 12.

(d) Cited in the case of *Rutland v. Bowler*, Palm. Rep. 290.

DODDERIDGE'S

PALMER
v.
KEBLE-
THWAITE.

DODDERIDGE's opinion there. Besides I may have a property in the water for other uses than that of my mill, and then it is well laid here. In *Fletcher v. Palmer*, 15 Car. 2. Case for stopping up lights, held an action lay for the lights of a new house. I need not say the house is ancient, where a gutter is stopped. If we bring an action for not doing a thing, we must say it was ancient, but if we lay a misfeazance it is otherwise. In *Trotter's Digest* of writs, *de executor*, the executor may bring an action for a chest against a stranger, though it do, with the writings, belong to the heir.

* [65]

HOLT Chief Justice said, Suppose a water-course run to my ground, and I have no use for it, and one, upon another ground, divert it before it come to * mine, will an action lie? Is not this the same, must you not lay some use for it? But you will speak to it again, &c. (c)

(c) This was a writ of error on a judgment for the plaintiff in the Common Pleas, S. C. 3 Lev. 133. on a special verdict on one count, and demurrer to another,

S. C. Skin. 68. 175. and the judgment was affirmed, S. C. 3 Mod. 52. S. C. Carth. 85.

Case 61.

Sleigh against Chetham.

In a *formdowin* in remainder the tenant after appearance by attorney and issue joined, calls an *effoin* instead of appearing on the return of the writ; which *effoin* being challenged, an imparlance is granted: if the tenant at the ensuing term do not save his first default, the demandant may sign *final judgment* although no *petit cape* has been awarded.

S. C. Ante. 20.
S. C. 3 Lev. 67.
S. C. Carth. 45.
S. C. Lutw. 489.
Co. Lit. 73.
6 Co. 19.
2 Inst. 342.

TREBY now argued for the plaintiff in error, That the judgment final is erroneous, for that a *petit cape* ought to have been awarded. An *effoin* is an allegation of an excuse for non-appearance; if not legal, it is as if there were none: there are but two sorts of defaults; one before appearance, and one after; in the latter case the party is to be brought in upon a *petit cape*. Another sort of default which is improperly called so, is where a man impails to a time certain, and being called the same term and doth not appear, this is called a departure in despite of the court. (a) This ill *effoin* when turned to a default, which was when it was judged ill, was a *favable* default, and then a *petit cape* ought to have issued; this amounts to no more than a default, and was *favable* by the death or imprisonment of the attorney. (b) This is a real action and concerns the freehold, and is a matter of the greatest value, and the greatest favour is given to the possessors of it. In personal actions a default after appearance is *peremptory*. (c) The law gives great delays and benefits to the possessor of land; by this hasty judgment the inconveniencies happening to the tenant is the loss of his freehold: nevertheless his default was *favable*; now there is no way to save it, but upon this process of *petit cape*; he could not save it before it was adjudged, and he could not save it after, because, by the default, he was turned out of court. This method takes away the opportunity of receiving the wife or remainder to come in (d) and be tenant by

(a) Co. Lit. 259.
(b) 5 Hen. 3. pl. 7. Rastal 585. 12
Hen. 4. pl. 14. 11 Hen. 4. pl. 87.
(c) Co. Lit. 134.

(d) 11 Co. 39. and see also Dyer 103.
315. 341. 22 Affize, pl. 22. 24 Edw. 3.
pl. 29. 17 Edw. 2. pl. 173.

receipt. In *Metcalf's case* it is said the *feme* was received upon the return of the *petit cape*. Then for authorities, 9 *Hen.* 5. 12. a *petit cape* was awarded, *Cro. Car.* 517. *Jones* 412. 1 *Roll Abr.* 45 *Edw.* 3. 19. *Kehway* 41. 3 *Hen.* 4. 4 *Dyer* 24. All these cases are but one, and stronger than those; for there was an ill voucher, and yet a *petit cape* awarded.

SLEIGH
v.
CHETHAM.

OBJECTION. Here is the party called in *ad salvandum defaultam*, and he did not, and so is the entry made. ANSWER. He could not save his default, for no man can do it but when he comes in upon process. The defaulter was not * in court to save his default, having no summons or process to call him: he was not there as a party appearing for that purpose, he was only there to defend his essoin as it was challenged, but not to save the default, 7 *Hen.* 4. 14. An essoin was cast, the tenant was re-summoned, because the court had adjourned it, and taken time to consider of it.

* [66]

OBJECTION. This default is after imparlance, and therefore judgment final. ANSWER. None of their cases come up to the purpose when they are distinguished and understood; for all their cases are to be understood of an imparlance to a day certain, or a day uncertain in the same term in which the imparlance was taken: this is the true intendment of all these books, and I do agree, that such a default as a departure in despite of the court will be peremptory, and *Brook* (e) gives the reason of it because the term is but one day. In the case of *Lilburne v. Heron*, (f) it is that a default after appearance is when it is a default upon imparlance immediately after it, and then he may be more stiffly held to it, because the continuance is by imparlance; but this continuance here is not by the imparlance, but by an adjournment two terms after.

OBJECTION. That in a writ of right, a default after *the mise* joined upon the meer right is final; but the case of *Penryn*, 5 *Co.* 85. is quite contrary to the case of *Lilbourn v. Heron*, and so is THE YEAR BOOK of 38 *Edw.* 3. pl. 13. 39 *Hen.* 6. pl. 16. pl. 17. because it is a *departure* in despite of the court. But admitting it to be a special case, and no argument to be drawn from it; and so is 39 *Hen.* 6. pl. 16. pl. 17. yet THE YEAR BOOK says, it is in that single case, and not to be extended further; and the 12 *Hen.* 7. pl. 10. gives the reason for it, because it is the highest writ. There are other proceedings in that than in any other writ. In a writ of right there is no challenge to the inquest: the tenant must begin to give evidence on the issue of meer right, for he is *quasi actor*, and hath a perpetual judgment for him for an enjoyment. (g) If a release be pleaded it is triable by another common jury, and a default after that is not peremptory. (h) In all cases where default is, except on the meer right a *petit cape* shall go, and the default is not

(e) *Bro. Abr.* title "Departure," 7 *Hen.* 4. pl. 19.
(f) *Cro. Jac.* 292. *Yelv.* 211. 1 *Bull.* 159. See also 2 *Saund.* 46. *Co. Lit.* 355. *Dyer* 24. 98. 5 *Co.* 85. 3 *Bl. Com.* 195.

(g) *Co. Lit.* 294.
(h) *Brook*, "Droit," pl. 30 and 48; and *Statham Abr.* "Droit," the last placitum but one.

peremptory.

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v.
CHETHAM.

* [67]

peremptory. As to the 24 *Hen. 6. pl. 28.* that may be answered, because the matter was tried.

* TRINDER. The judgment final was well given. An effoin cast when he had an attorney was an ill effoin, and then the effoin being disallowed that turns to a default. If a tenant make default before appearance a *petit cape* issues; if it be after appearance and a general imparlance, there is cause for a final judgment, because it is a despight to the court: otherwise on a *dies datus* given by the court, there issue was joined and a *venire* was awarded, and at the return the default was. This is a very great delay to the party, and a contempt to the court; such is fatal, if after *the mise* or issued joined. (i) If so in a writ of right where judgment is fatal and final, much more here in an action of inferior nature. Before issue joined it is otherwise. (k) This is a special default, and such a kind of criminal default as is mixt with a contempt, that will produce a final judgment even before imparlance. The casting of an ill effoin, and demurring to a challenge is a great contempt, and much greater than a default on a general imparlance, which is agreed to produce a final judgment. If the tenant had made default upon the day of the adjournment of the effoin, that would not have produced a judgment final; so if he had waived it; but if he stand the argument of the effoin, and that is adjudged against him, it turns to a contempt. (l) And in *Moore 711.* the party is estopped to say the attorney is dead or removed, because he appeared by him, and that would be contrary to the record. (m) If he appear and shew not his warrant for the effoin, he shall lose his seizin of the land, (n) besides a *petit cape* is useless in this case, for that is to bring him in to excuse his default, and he can alledge none of these excuses; for this is not a common default, but a special one by casting an insufficient effoin. A *petit cape* is dilatory in its nature, and therefore it is a kind of discretionary thing, for it is not an error, if awarded where it is not necessary: on the whole he prayed an affirmance of the judgment. *Adjournatur.*

Judgment afterwards affirmed PER TOUT LE COURT.

(i) Fitz. Abr. title "Judgment," pl. 152. 161. 228. 245. Co. Lit. 295.

(k) See the case of Sir Percival Willoughby v. Egerton, Cro. Jac. 35. and William v. Gwyn, 2 Saund. 45.

(l) Fitz. Abr. "Grand Cape," 6. 12.

Bro. Abr. "Grand Cape," 4. 45 Edw. 3. pl. 14. 21 Affize, pl. 17.

(m) Cro. Jac. 521. Fitz. "Effoin," 16. 138. Bro. "Effoin," 32. 12 Hen. 4. pl. 14.

(n) Vide Fitz. N. B. 9. Writ of disseisin in nature of *audita querela*.

Case 62.

* Cross against Gardner.

* [68]

An action will lie against one that hath possession of goods, and sells them as his own, and they are not. — S. C. 3 Mod. 261. S. C. Carth. 90. S. C. Comb. 142. S. C. Holt 5. 1 Roll. Abr. 91. Stiles, 310. More, 126. Cro. Car. 141. Jones, 196. Cro. 44. 2 Roll. Rep. 5. Cro. Jac. 197. 469. 474. 630. 10 Mod. 142. 1 Lev. 102. 1 Sid. 146. 463. 1 Salk. 210. Comb. 163. Ld. Ray. 284. 593. 1118. 1 Bat. Abr. 51. Stra. 414. 2 Burr. 112. Dougl. 653. 3 Term Rep. 51.

CASE. The declaration states that there was a *colloquium* between the plaintiff and defendant, concerning certain oxen in the defendant's possession and the sale of them; that the defendant

did

did then and there affirm them to be his own; that the plaintiff *ratione inde*, did buy them, and gave so much; that in fact the oxen were the property of J. S. and he seized and took them.

CROSS
v.
GARDNER.

On the general issue, and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration is ill, for here is no *warranty*. An affirmation of right will not amount to it; for it ought to be *warrantizando vendidit*; nor is here any deceit, for it is not said, "knowing them to be none of his," and he might come to their possession as executor, or they might be like his own, and in the night his own removed, and these put in their places, and so he not guilty of any falsity.

E CONTRA urged, that here is a *colloquium* laid of them, and we bought them trusting to that affirmation which was false, and that is a deceit. If a man having possession of goods sell them as his own, an action lies for the deceit.

And at last upon much debate judgment was given for the plaintiff. These cases were cited, *Cro. Jac.* 474, 196, 197. 42 *Affiz.* 8. *Moore*, 126. *Kenrick's case*, *Roll.* 1. *Abr.* 96. *Harvey v. Young*, *Yelv.* 40.

Lee against Libb.

Case 63.

Hilary Term, 1 & 2 Jac. 1. Roll 497.

• [69]

EJECTMENT by lessee of the heir at law. The defendant claimed by a devise, found in a special verdict thus. That *John Denham* made his will in January, 1678. That there were two witnesses to it, who subscribed their names in the presence of the testator. That he made a codicil, December 1679, and by that confirms his will in what is not altered, and gives away somewhat otherwise than in the will, and there are two witnesses to it; one of those to the former and one more. The *quære* is, if these make three witnesses to the will.

If a devise be made by a will, attested by two witnesses, and the testator afterward make a codicil, in which he confirms the devise, and this codicil is attested by two witnesses, one of which was not a witness to the will, the devise is void; for the execution of the will by which the devise was made, is not attested by three witnesses as required by 29 Car. 2. c. 3.

THOMPSON. The clause of the act is thus: "All devises of land shall be void, unless attested and subscribed by three witnesses in the presence of the testator." Now here are not three witnesses to either; as there are two distinct writings, * so there is a year's distance of time between them: the will hath but two witnesses who subscribed to the will. Then the third, that is to the codicil, he did not subscribe to the will, so he never saw the testator sign his will: his hand which is subscribed to the second writing is not a subscription to the will.

S. C. Post. 88. S. C. 1 Eq. Abr. 402. S. C. 3 Mod. 262. S. C. 3 Salk. 395. S. C. Comb. 174. S. C. Carth. 35. S. C. Rep. Eq. 263. S. C. Holt. 742. Post. 89. Carth. 514. 2 Vern. 593. Skin. 227. 2 Atk. 176. 1 Willf. 313. 1 Bl. Rep. 408. Gilbert's Devises, 93. Cowp. 49. Dougl. 36. Post. 89. Comyn's Rep. 197. Skin. 227. 3 Com. Dig. "Devise" (E 1.) 2 Atk. 176. Strange 1109. 3 Mod. 218. 2 Vezey 454. 3 Peer Wms. 252. Cater v. Price, Dougl. 241. Clerk v. Ward, 1 Brown. Parl. Cases, 137. and Capon v. Dade, 1 Brown. Cases Chan. 99.

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F

TREBY

LEE v. LEE.

TREBY *contra*. The first is subscribed by two witnesses. As in the case of *Woodroff v. Brown*; he makes an addition to his will, and declares that he had made it, and doth testify it, and declares this to be a part, and then *Brown* and one *Head* subscribe it: this is a subscription by three witnesses; the first and second writing are to be taken together, and do make but one will. A man may make his will in several writings, and those writings may be made at several times; no man can think all his thoughts, much less write them all at once, and if tacked by the mind of the testator, these several writings do make his entire will. Suppose he published it before two witnesses who did subscribe, and then afterwards he republishes before a third witness, this is a will attested by three witnesses, though at several times. It is true, the papers are not affixed together, and there is no necessity by the law that they should be so. Suppose in several loose sheets, one witness subscribe to one sheet, and another to another, and a third to a third, that is good, if all are present to the last sheet's publication. If several sheets are wrapped up in a paper, and all superscribe the covering paper, would not that be good? he compared it to *Mollineux's case*, Cro. Jac. 144. Noy, 117. Two things together may make that good which severally they cannot; *juncta juvant*; both together were plainly the intended will of the party.

DOLBIN *Justice*. The signing of the will is not necessary to be in the presence of the witnesses, but their subscription must be in the testator's presence.

Skin. 227.
3 Lev. 1.
1 Sid. 362.
Stia. 764.
1 Will. 313.
Doug. 242.

HOLT *Chief Justice*. The testimony of the witnesses is to be to all that the statute hath made necessary, and the signing of the party is one thing necessary, and the sealing is a signing.

DOLBIN *Justice*. In the *earl of Essex's case*, before this statute, agreed, that one sheet was found in *Essex*, and another in *Staffordshire*, and made but one will.

EYRES *Justice*, took exception to the verdict. It is not found that the third witness to the codicil did subscribe in the presence of the testator; but only that he did subscribe *ut testis*, and not said expressly in *præsentia testatoris*. But *per TREBY* * the fact was so. And that was amended by consent afterwards, &c. *Adjournatur*. (a)

* [70]

(a) The Court were unanimously of opinion, that the will was not good, because the devise was not attested by three witnesses. Post. 83.

Skinner against Kilbys.

Case 64.

Trinity Term, 1 William and Mary. LILLY Attorney.

COVENANT. Breach in not repairing. The defendant says he did repair, *et hoc paratus est verificare*. General demurrer. Urged for the plaintiff, that the plea was ill, because he did not conclude to the country. WINNINGTON for the Defendant. Where *the negative* is first, and *the affirmative* afterwards, he need not conclude to the country, because the first negative is the full stop. But **PER CURIAM** no difference which is first.

If a plea conclude with an *averment* instead of to the country, it is bad, on demurrer.

S. C. Carth. 87.
S. C. 3 Salk.
210.
S. C. Holt, 542.
Cro. Car. 164.
Ray. 94. 98.
Lot. 21. 101.
2 Saund. 190.

Then he argued that it was but matter of form, and well enough on a general demurrer. But **PER CURIAM**. It is substance and material, according to 2 Saund. 190. and *Dove v. Bayley*. 3 Keb. 127. Judgment for the plaintiff. (a)

1 Vent. 240. 1 Sid. 215. 5 Com. Dig. Pleader (E 32.) Dougl. 58. 2 Term Rep. 439.

It was held by the Court, that in covenant *habuit jus et titulum*, &c. is well enough in breach for the entry of a stranger, because you know not his title; but however you must say, *habuit ante dimissionem*, for if it were since, it is ill, because it might be from the plaintiff himself.

A stranger, *habuit jus ante dimissionem*, entered, good.

1 Mod. 66. 101.
292.

Cro. Jac. 312. 4 Mod. 78. 3 Mod. 135. Dougl. 43. 1 Term. Rep. 671. 3 Term. Rep. 584.

(a) But see 1 Vent. 240. Lutw. 21.

Saunders against Ferryman.

Case 65.

AN *babeas corpus* to the sheriff of Berks, one *Beaver*, who returned several actions and executions upon the defendant, and also specially that he did escape, and he retook him and detained him *pro causis supradictis*, yet he was turned over to the King's Bench. And **PER CURIAM**, he may there charge him with an action. And that resolution in *Ridgway's case*, 3 Co. 52. that the sheriff may retake and detain, though so positively laid down there, is not in *Popham's Rep.* 42; and in *Moore's Rep.* 660. is the clean contrary delivered for law. (a)

If a sheriff suffer a negligent escape, he cannot retake and detain his prisoner.

Post. 177.
1 Sid. 330.
Moore. 404. 597.
Cro. Eliz. 53.
237.

2 Mod. 136. 3 Com. Dig. "Escape." (E.) 2 Black. Rep. 1048. Comy. Rep. 354.

(a) But see *Bonafous v. Walker*. 2 Term. Rep. 128.

Case 66.

* Wilkins *against* Wilkins.

* [71]

HOC TERMINO, *loose Roll*. BRABON *Attorney*.

An action on the case lies by A. for goods delivered to B. to trade withal on a promise by B. to dispose of the goods and to render him an account of them.
S. C. Salk. 9.
S. C. Comb. 149.
S. C. Carth. 89.
S. C. Holt. 6.
2 Danv. 493.
Dyer 20.
2 Bulst. 256.
Dougl. 137.
2 Term Rep. 479.
3 Term. Rep. 418.

CASE. The declaration states, That the defendant had received divers goods of the plaintiff to trade withal, and to render an account to the plaintiff, and promise to render an account. The defendant pleads in *abatement*, that he received them as *bailiff* for the plaintiff, and was to account for them, and prays judgment, if compellable to answer this bill. Demurrer.

Argued, that *account* lies, and not *case*, that here he cannot have allowance. Besides, bail is not required in account, as it is in this action.

GOODFELLOW. Either the one or the other lies, *Co. Lit.* 172. *Dyer* 20. *Hawkins v. Parke*, 1 *Roll's Rep.* 52. Covenant lies, if by deed, as well as an account.

HOLT *Chief Justice*. The inconvenience is, the giving a long rambling account in evidence to the jury; and there is no case where a man acts as bailiff, but he promises to render an account.

DOLBIN *Justice*. An exprefs promise will make him chargeable.

And afterwards PER TOUT LE COURT, the plea was over-ruled, and judgment given for the plaintiff.

Case 67.

Lewis *against* Weeks.

A declaration in debt on a judgment in a hundred court, is good after verdict, although none of the proceedings are stated.

S. C. Comb. 149.
S. C. Carth. 85.
S. C. Holt. 289.
Ante, 61.
Lev. Ent. 176.
2 Lev. 81.
2 Mod. 195.
Lane, 52.
Cowp. 455. 826.

DEBT on a judgment in a hundred court. *Nil debet* pleaded. Verdict for the plaintiff.

Moved by MR. NORTHEY in arrest of judgment, that the declaration is ill, because only faith *recuperasset*, and doth not set out *the process*, nor so much as *the plaint*.

PER CURIAM. Upon debate, held good *after a verdict*, because upon the trial they must prove it all, or else could not have had a verdict; for where executor brings debt for rent on a lease by the testator, and doth not set forth the title his testator had, and it might be such as the rent should go to the heir; yet after verdict held they would intend such a title in the testator, as should give the executor the rent. Judgment for the plaintiff. (a)

(a) *Sed quere*. And see *Stannion v. Davis*, 1 Salk. 404. 6 Mod. 223. *Peacock v. Bell*, 1 Saund. 73. 2 Lev. 87. *Waldeck v.*

Cooper, 2 Willf. 16. *Winford v. Powell*, 2 Ld. Ray. 1310. *Rowland v. Veale*, Cowp. 18. *Trevor v. Wall*, 1 Term. Rep. 151.

* Hill against Dade and others.

Case 68.

Easter Term, 3 Jac. 2. Roll 21.

* [72]

COVENANT. Demurrer. Judgment for the plaintiff. Inquiry. Moved in arrest that the declaration set forth an indenture, and then in that a recital of several indentures, and then (intended for a recital too) *cumque per unam al' indentur' inter, &c.* and then says, *Et ulterius testatum sit per indentur' præd'*, the covenant upon which the breach is.

A relative shall be taken to refer to the last antecedent.

2 Roll. Abr. 252. 351. Cro. Jac. 646. 677.

URGED that the *præd'* shall refer to the indenture last mentioned, unto which the defendant is no party, and it cannot be a recital, for it is a new commencement, *cumque per unam al'*, and *præd'* must refer to the last antecedent.

Savil. 124. See 4 Com. Dig. "Parole" (A 15.)

THE COURT inclined it was ill. *Adjournatur.* (a)

(a) See this case cited in *Brigstock v. Stanion*, 1 Ld. Ray. 107, thus: "*Dade and others were farmers of the Irish revenue of the crown. Hill became security for them for the payment of the rent, and they covenanted to indemnify him; upon which Hill brought covenant against the defendants, and shewed that they were in arrear in their rents, whereby he was*

forced to pay great sums of money; upon which declaration the defendants demurred; and the opinion of the Court was with the defendants, because the declaration was too general; for it had not specified what sums he expended: but TREW Chief Justice said, that he was counsel in the cause, and that no judgment was given in it."

Peirce against Smith.

Case 69.

Trinity Term, 3 Jac. 2. Roll 1160:

EJECTMENT. Special verdict finds, That one *Basket* being seized in fee made his will, and devised the lands in question to his five executors for ninety-nine years for the payment of his debts and legacies, with power to make leases, &c. and after the determination of that term, then to his brother *John Basket* and his heirs. And the testator does further will, that if the brother give security for payment, &c. he should have it immediately: the testator dies; *John Basket* with the assent of the executors enters, and made some leases and took the profits; then he levies a fine, and five years passed, and then he dies above five years since, the debts unpaid; *et sic, &c.*

On a devise for term of years made to executors for the payment of debts and legacies, with remainder to J. B. in tail, and that if J. B. give security for the payment, he shall have the lands immediately; if J. B. enter, and after payment of some of the debts and legacies, levies a fine and five

And whether the fine be a bar to this term for ninety-nine years; and whether it was divested and turned to a right at the time of the fine levied: if it were not, the fine will be no bar.

years pass, yet the term for years is not barred. — S. C. 3 Mod. 195. S. C. Comb. 145. S. C. Carth. 100. 5 Co. 124. Cro. Jac. 61. Cro. Car. 110. 9 Co. 106. Ray. 149. Hard. 401. Plowd. 435. 1 Vesey, 387. 2 Vesey, 472. 3 Atk. 336. Cases Ch. 278. 1 Chan. Rep. 27, 33. 3 Bac. Abr. 442. Cruise on Fines, 194.

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If an entry be made upon a term for years with an intent to displace him and usurp the possession, that doth turn it to a right, but it must be an actual expulsion, and without the consent of the party. If this term were not divested, it is not barred, according to the case of *Margaret Podger*, (a) and *Seymour's case*. (b) The reason why a man is barred by a fine is, because he doth not make a claim, and he that is in possession need not make a claim. (c) Now here is nothing to put the executors out of possession. The entry of *John Basket* * the brother into these lands, doth no ways divest the term, but rather affirms it. *Cestuy que trust* is always tenant at will to the trustees. *Basket* was but a tenant at will, and that because he came in by their assent; now a man cannot be a wrongdoer where the party agrees to it. *Blundel v. Baugh*, (d) is express in it; and by *Littleton*, (e) this is but an executing and affirming the term. But then they say he took the profits, and let parcel of the land to pay debts; this is no divesting, no evidence of divesting; it was but a contract, it divested nothing, it turned nothing into a right. He demised parcel to undertenants for years, but it is not found that they entered, and then it was only a contract: here was no intent to turn the term into a right; the lessees claimed only for one or two years, not for ninety-nine, much less for a longer; these under-leases are good between the parties, but as to the termors for ninety-nine years, they are but licences from *John Basket* to enter. It is not a divesting but at election; (f) and since they do not admit themselves dispossessed, the law will not judge it so. (g) *Blundell's case* is cited in *Latch*. 53. and 1 *Rolls Abr.* 661. and approved there. (b)—*Litt. Inst.* 588, 589. *Freeman v. Barnes*, 1 *Sid.* 458. "A term that is not to attend the inheritance cannot be barred," says that case, *Latch* 75. It is not the intention, but at the election of the party whose interest is to be divested. *Fermor's case*, 3 *Co.* 77. is sufficient for me; the fraud there afterwards in paying the rent was not the occasion of the judgment, for the fine operated what it could at the time of levying it, 2 *Bulst.* 138, 139. Then consider the inconvenience will be great: if a mortgagor let his land by lease, and then levies a fine, this will not bar the mortgagee's term.

HENRY GOULD for the defendant. The words of 4 *Hen.* 7. c. 24. make it plain; so that we are within the letter of the law: after the ingrossing it is to conclude as well privies as parties. Then come three savings, the last is "to such persons such action," &c. There are three cases where fines are no bar: where there has been fraud; where an incapacity in the party; and where the interest was not divested: an interest for years, though not executed, is barred.

(a) 9 *Co.* 104. 1 *Brownl.* 181. 2 *Brownl.* 334.
(b) 10 *Co.* 95.
(c) 2 *Inst.* 517.
(d) *Cro. Jac.* 302. *Jones*, 315. *Latch*. 53.

(e) *Lit. sect.* 17.
(f) *Peaseley v. Blackman*, 2 *Roll. Abr.* 285.
(g) *Dyer*, 61. 173. 1 *Leon.* 171.
(h) *Co. Lit.* 323. *Cro. Car.* 303. *Roll. Abr.* 658. *F. N. B.* 179. 2 *Sid.* 75.

Saffin's case. (i) Fraud is not to be presumed if not found, and so is the case of *Grip v. Pratt*, (k) and the case of the *Chancellor of Oxford*. (l) This is not a lease at will, as is *Blundell's case*; there it is said, "That he entered and occupied at will;" here it is, "That he entered by consent," but * also, "that he took the profits," and not said "by the like consent." An entry by consent shall never vest any thing, as in the case of *Bastard and Mullier*, (m) but taking the profits is more. But supposing it a lease at will, whether it be a *divesting*, or *displacing*, or *disseisin*, it is all one, if the party be out of possession; (n) so that entry or claim is necessary, that is enough to make a bar, according to *Margaret Podger's case*. Tenant in tail being lessee at will, he levies a fine, it must pass and carry away his estate in possession as well as his estate in tail; for a fine is a feoffment upon record; a fine cannot work by fractions, but must carry away the whole; *Saffin's case* is full to this. Then the termor's entry is necessary, and consequently claim is necessary, and interest may be barred, though never turned to a right, as is *Sid. 459*. He cited *Isbam v. Morris*, *Cro. Car. 109*. for it seems strong for him. *Vide Mayor and Commonalty of London v. Aisford*, *Cro. Car. 575*.

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HOLT Chief Justice. Where an entry is necessary to vest an interest, such right will be barred, that is the true reason of the resolution; a devise vests an interest without entry; then if they are divested of this, is the question. Here is five years non-claim after *John Baskett's* death who was tenant at will; where there are acts done, and a possession continued against a termor, a fine may bar; but where another person continued the possession by five years, it may be a question.—To be argued again. (o)

Co. Lit. 112.

(i) 5 Co. 123.

(k) *Cro. Car. 550*.

(l) 10 Co. 56. See also *Cro. Eliz. 292*.
816. 1 Lev. 279. *Moor. 194*. *Cro. Jac.*
451. 1 Brownl. 36. 2 Jones, 92.

(m) *Co. Lit. 15. a. 243. 244. a. 248*.

(n) 3 Term. Rep. 162.

(o) S. C. 3 Mod. 195. says it was agreed that the entry of *John Baskett* was tortious, because the legal estate was still in the trustees, and their consent could not

make him, by the entry, more than tenant at will, and that such a right not being assignable, the term was not barred by the fine: but the case was adjourned *S. C. Carth. 100*. *S. C. Comb. 148*. See *Saffin's case*, 5. Co. 124. 3 Bac. Abr. 446. *Edwards v. Slater*, Hard. 410. *Focus v. Salisbury*, Hard. 400. 3 Bac. Abr. 448. *Cabot v. Stone*, Ray. 140. *Freeman v. Barnes*, 1 Vent. 55. 1 Lev. 1. 270. and *Cruise on Fines*, 243.

Case 70.

Parkinson's Case.

A *mandamus* will not lie to restore a person to a fellowship in a college, if the college has a visitor.

S. C. 3 Mod.

265.

S. C. Comb.

243.

S. C. Carth. 92.

S. C. Holt. 143.

1 Mod. 83. Skin. 454. 4 Mod. 112. 124. 10 Co. 31. 1 Sid. 31. Ray. 68. Carth. 168. Andr. 177.

2 Burr. 1044. 3 Bac. Abr. 533. 534. 1 Burr. 195. 2 Burr. 1044. Cowp. 337. 378. 1 Bl. Rep. 22.

91. Dougl. 533. 2 Term Rep. 290. 3 Term Rep. 575. 4 Term Rep. 233.

Where there is no *capias* in *mesne process*, there shall be no *ca. sa.* in execution.—1 Roll. Abr. 896. 897. 3 Co. 12. a. Co. Lit. 394. Dyer, 306. 4 Bulst. 63.

WINNINGTON moved for a *mandamus* for him to be restored to a fellowship in a college in *Cambridge*, and *PER CURIAM* denied, because there was a visitor there; and in *Dr. Goddard's case* (a) here denied, *Dr. Robert's case* denied, and in *Dr. Merri's case* to the College of Physicians. (b)

Dictum fuit per HOLT Chief Justice. That every college hath a visitor either by appointment of the founder, or the law: if a lay one, the founder or his heirs (c); if an ecclesiastical one, the bishop of the diocese.

NOTE. In an affize of nuisance, a *capias* lies not upon the judgment, because it lay not in the *mesne process*.

(a) But the Court will grant a *mandamus* to a visitor where, by the statutes of a college, an appeal is lodged with him, to hear an appeal and give some judgment. *Rex v. Bishop of Lincoln*, 2 Term Rep. 338. *notis*.

(b) 1 Lev. 19. 1 Sid. 29. 1 Keb. 75. 84. Anonymous.

(c) See the case of *Rex v. St. Catherine Hall, Cambridge*, 4 Term Rep. 233.

Case 71.

* The King against Speak.

An attainder of treason reversed.

S. C. 3 Salk.

358.

S. C. Comb. 144. S. C. Holt. 269. S. C. Trem. 3. Post. 131.

ERROR. Indictment for treason, and on the finding it, it is *præcept' per Curiam vicecom' quod venire faceret*: Ill, because it should have been *non omittat' quin caperet*. Reversed. (a)

■ [75]

(a) See the indictment in this case, *Tremain*, 3. but it appears S. C. 3 Salk. 358. S. C. Comb. 144. S. C. Holt. 269. that

the attainder was reversed, because the prisoner was not properly arraigned.

Rawlinson *against* Oriet *and another*.

Case 72.

Hoc Termino, G. WOOWARD *Attorney*.

TRESPASS, for taking goods, against two defendants. They plead in abatement, That the plaintiff had sued a bill against one of them for the same trespass, and yet depending. Demurrer.

Argued for the plaintiff, that this doth not abate against the other, and cited 14 *Hen. 6. pl. 3.* for where the matter arises on the plaintiff's part, they may join in a plea of abatement, but where it arises on part of one of the defendants, he only can plead it, 13 *Hen. 7. pl. 14.* therefore both ought not to join in this plea.

TREMAIN *é contra*. The plea is good, and so is the case of *Earl Bedford v. Bishop of Exeter*, *Hob. 137.* There they plead in abatement, that another *quare impedit* was brought against one of them; and the judgment of the court is, that the writ should abate. The pleading is in *Winch's Entries 892.*

HOLT Chief Justice. The reason why another action pending shall abate the subsequent action is, because of the double vexation; now the other is not vexed, and therefore no reason that it should abate as to the whole. Where you plead a *misnomer*, it shall abate only as to him, unless where the death of one shall abate the writ, as when upon a joint-contract, otherwise if in trespass.

EYRES Justice. According to the case of *Ferrers v. Arden*, *Cro. Eliz. 668.* the other defendant, who is privy to the action, being party in the trespass, may take advantage of it, to plead in bar where there is a recovery or bar in another action, and no reason why he may not as well in abatement. *Adjournatur. (a)*

(a) S. C. Carth. 96. says that **HOLT Chief Justice** doubted; but that the three other judges inclined that the plea was good as to both defendants; and in S. C. Carth.

144. the Chief Justice seems to concur with the rest of the court. But see *Wallis v. Savil*, 1 *Lutw. 42.* and *Idham v. Hitchcock*, *Cro. Eliz. 202.*

* *Parsons against Bickmead.*

Case 73.

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PLEA amounting to the general issue, good upon a general demurrer.

Plea amounting to the general issue is *form only*.

Post. 133. Cro. Eliz. 871. 1 Roll Rep. 113. 2 Roll Rep. 350.

Case 74.

Trippet *against* Eyre.*In the Common Pleas.**Trinity Term, 4 Jac. 2. Roll 1035.*

On a submission to arbitrators, with power to choose an umpire; if the one they choose refuse, they may choose another?

S. C. 3 Lev. 263.
S. C. 2 Vent.
313.

S. C. 5 Mod. 457. Hob. 167. Palm. 289. Cro. Eliz. 7. 2 Saund. 127. Carth. 412. 1 Sid. 428.
1 Lev. 174. Raym. 187. 1 Salk. 70. 72. 2 Bac. K. B. 154. 3 Keb. 387. Freem. 378. 2 Mod. 169.
Ld. Ray. 671.

DEBT on a bond, in the Common Pleas, conditioned to perform an award. On the pleading, the case was thus: Submission to two arbitrators, and in case they make no award, then to the award of such umpire as they shall choose: they choose J. S. for umpire; he refuses to intermeddle: they choose another; he makes an award. If good? for on one side it is said they have executed their authority, and cannot make another: on the other side, he was no umpire that refused to make an award, and therefore none was chosen by them but this. (a)

(a) THE COURT held, that the choice of the first umpire became void by his refusal, and as if no nomination had been made; for insufficient acts are no acts in law; and judgment was therefore given for the plaintiff, by POWELL, ROKESSY, and VENTRIS, Justices, against the opinion of POLLEFFEN Ch. J. S. C. 3 Lev. 263. with the argument of the Chief Justice, S. C. 2 Vent. 115. and S. C. 5 Mod. 457, 458. with the arguments of all the judges. But see

Reynolds v. Gray, Easter Term, 9 Will. 3. 1 Salk. 70. 1 Ld. Ray. 222, where HOLTT Ch. J. is of opinion, that the nomination of an umpire determines the authority of the arbitrators, although the umpire refuses, unless he is nominated upon an *express condition*. But ROKESSY J. doubted, for that the authority to elect an umpire implied a condition that he should accept the office. See Ld. Ray. 671. 2 Term. Rep. 645.

Case 75.

Fitz-Gerald *against* Clanrickard.*Mich. Term, 2 Jac. 2. Roll 120.*

In what cases diminution may be alledged.

S. C. Holt 269.
S. C. Comb. 168.
S. C. 3 Mod.
269.
S. C. Carth. 94.
Post. 214.

1 Sid. 40. 139. 147. Cro. Jac. 130. Cro. Car. 91. 1 Salk. 267. 5 Com. Dig. Pleader (3 B. 13.)

ERROR on a judgment in the King's Bench in *Ireland*. If want of a warrant of attorney be assigned for error, you must pray a *certiorari* to certify that there is none; and if no certificate, then the error falls to the ground. The same is for want of admission of a guardian, which is upon another roll, *viz.* the philazer's, and therefore you ought to pray a *certiorari* when you assign that for error. PER HOLT.

Case 76.

The King *against* Fairfax.

Justices may compel a man to take an apprentice against his will.

S. C. Comb. 164.
S. C. 3 Mod. 269.

ORDER of sessions upon a man to take an apprentice, moved to be quashed by

POWELL, *Serjeant*, for they cannot compel any man to take an apprentice against his will. The effect of the statute 5 Eliz. c. 4.

S. C. Carth. 94. S. C. Holt 570. S. C. Foley 203. 1 Sid. 99. Ray. 65. 177.
1 Lev. 84. 1 Vent. 325. 12 Mod. 27. 1 Stra. 143. 2 Stra. 1268. 2 Ld. Ray. 1117. 2 Salk. 491.

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f. 23. is to make an infant's indenture of apprenticeship valid, notwithstanding his non-age; and the statute says, "as the parties shall agree," which governs the * whole clause, and shews plainly it was not their design to make it compulsive. Then for the 43 Eliz. c. 2. f. 5. these words, "where they shall see convenient," will not bear such a construction as to make it compulsory; whereas before they could only bind them to tillage, now they can bind them to other trades, for that they make a rate for it. Besides, had they this power, there would be no occasion for a stock of money to do it with. Then by 21 Jac. 1. c. 28. that enables the master to take and keep them. The general practice is objected; but I say that arises upon this mistake of the judges resolutions in *Dalton's Justice* (a); whereas TWISDEN *Justice* said they were never the resolutions of the judges, they were drawn for the purpose as reasonable, but never agreed unto. It is also objected, that the act then will have no effect; but this is a mistake; for they may raise a stock. Then *Pine's case*, Hill. 29, 31 Car. 2. (b) is express, and in *Cantual v. Egginton*, (c) TWISDEN *Justice* declared it to be the opinion of all the judges then.

SOMERS *é contra*. That they may compel. The words are plain, "where they shall see convenient." Those resolutions were so agreed and brought in by HIDE, and none but MR. JUSTICE JONES did differ from them, and the settled practice hath been all along accordingly: the end of the statute of 1 Jac. 1. c. 25. was to excuse the master from the penalties of former laws.

HOLT *Chief Justice*. The statute meant somewhat when it gave a power to raise a stock; that the master should have money with them, I think, otherwise it were needless; so that by my opinion they cannot compel.

DOLBEN *Justice*. In the case of *Rex v. Gilliflower* (d), before FOSTER *Chief Justice*, it was resolved that they were compellable, and FOSTER declared that it was so resolved in the beginning of King James's reign: in the twelfth year of Charles the First, HUTTON and CROKE declared it for law at Derby. In *Pyne's case* several of the judges did tell me that they were of a different opinion, and I think the practice is according to the law.

GREGORY *Justice*. The inconveniences will be greater the other way by mighty taxes; if a servant be disorderly the house of correction will reach him.

EYRES *Justice*. Where a statute gives a power it gives all that is necessary to that power, the justices have power to discharge the apprentice; I take it, they have distinct powers, they may bind to husbandry by compulsion, but not to others without money.

(a) Dalton's Justice, page 232.

(b) 2 Show. 193. 3 Keb. 516. 628.
636. 686. 854.

(c) Hilary Term, 14 & 15 Car. 2.
1 Sid. 99.

(d) Hilary Term, 14 & 15 Car. 2.
Raym. 65. 1 Lev. 84.

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* *HOLT Chief Justice*. Then in husbandry only they can bind by compulsion.

DOLBIN Justice. In the sixth year of Charles the First, it was questioned, whether an apprentice may be imposed on a *clergyman*, and all the judges in England gave their opinion for it. (e)

But the order was quashed because made by the sessions *originally*, and not by *appeal*.

And *HOLT Chief Justice* said, because it was not in husbandry : but by all the other judges, *le parte est compellable al prender un apprentice, ou al meins en husbandry*. (f)

(e) Dalton's Justice, edit. 1627, p. 232; and in Sir Bulstrode Whitlock's Memoirs, page 16; and in 2 Bulst. Rep. 341 to 358, are most of the resolutions that are in Dalton's Justice.

(f) The order was quashed because it did not appear that the apprentice was bound to *husbandry*, S. C. Carth. 95. or because the churchwardens were not mentioned in the order, S. C. 3 Mod. 271. S. C. Holt 570. S. C. Foley 203. or because it was made originally at session, S. C. Comb. 166. But all the reporters agree, that the *THREE JUDGES*, *contra* *HOLT Ch. J.* were of opinion, that the 43 Eliz. c. 2. f. 5. having empowered the churchwardens and overseers, with the assent of two justices, to bind parish apprentices, "where they shall see convenient;" an order for this purpose is compulsory on the master. See also Rex v. Steers, 1 Bott & P. L. 540. notis. Rex v. Crofs, Comb. 289. Rex v. Fleet, Cald. 31. to the same effect; and the statute of 8 & 9 Will. 3. c. 30. f. 5. which enacted, "that when any poor children shall be appointed to be bound apprentices pursuant to the

" 43 Eliz. c. 2. the master *shall receive* and " provide for them, according to the in- " denture signed and confirmed by the two " justices, and also execute the certificate " of the indenture, on penalty of TEN " POUNDS," has removed all doubts upon this subject; 1 Salk. 67. Rex v. Gould, 6 Mod. 163; and this compulsory power has been held to extend to persons occupying lands in the parish, although they do not reside there. Rex v. Clapp, 3 Term Rep. 107. Rex v. Tunstead, 3 Term Rep. 523. and seemingly to a person, although he is neither an inhabitant or occupier within the parish. Rex v. St. Margaret's, Lincoln, Burr. S. C. 728. Rex v. St. Nicholas, Nottingham, 2 Term Rep. 726. The sessions, moreover, are to judge whether the master appointed by the overseers is a proper person to be compelled to take the apprentice, 8 & 9 Will. 3. c. 30. f. 6. Minchamp's case, Salk. 491. Rex v. Saltern, Easter Term, 24 Geo. 3. 1 Bott. P. L. 555. pl. 791. It seems, however, that a master is not compellable to receive an apprentice, except under the 43 Eliz. c. 2. Rex v. Trevilian, 2 Stra. 1268.

Case 77.

Duppa against Gerrard.

Trinity Term, 1 Will. & Mary, Roll 21.

The gentlemen
ushers may
maintain *assump-*
sit for the fee
due to them
from a person
who accepts
knighthood.

SPECIAL action of the case for fees for being knighted, as a customary duty upon the *debit' et consuet' fore solut'* and an *indebitatus* for so much in that manner due for his fee, as such an officer, &c. Demurrer to the declaration, and judgment for the plaintiff, according to the case of the same plaintiff against *Stephens* in the Common Pleas some years since.

S. C. Carth. 95.

S. C. Comb. 163. S. C. Holt 584. 1 Danv. 26. pl. 15. Dougl. 728.

Breas against Baspoole.

Case 78.

Trinity Term, 1 Will. & Mary, Roll 22.

CONSIDERATION past is not traversable, agreed without much debate, on *assumpsit*, &c.

Consideration
past not tra-
verfable.
Ante 50.

Brandling against Milbank.

Case 79.

Easter Term, 4 Jac. 2. Roll 316.

ERROR upon a judgment in the Common Pleas in debt upon a bond against an heir. He pleads payment by his ancestors; judgment general is given against him.

In debt against
an heir on the
bond of his an-
cestor, if he
plead payment
by his ancestor,
and it is found
against him, the
judgment shall
be against him
generally.

HOLT argued, that this is ill. The case of *Davis v. Pepyes* in *Plow.* 440. was never adjudged. In the case of *Clothwathby v. Clothwathby*, 1 *Cro.* 437. held that *non est factum* pleaded to annuity, brought against an heir upon the deed of his ancestors, will not produce a general judgment; and in the case of *Bowyer v. Rivelt*, *Pop.* 153. that case of *Davis v. Pepyes* is denied to be law, and so is it in *Jones* 88.

S. C. Comb. 162.
Plowd. 440.
Dyer 149. 373.
344.
2 Roll Abr. 70.
71.
2 Leon 11.
Carth. 93.
2 Lev. 178.
3 Lev. 189.
Cro. Eliz. 692.

And of this opinion was DOLBIN Justice strongly, and that there was no reason why an heir should be more charged upon such a plea than an executor.

* HOLT Chief Justice. An heir is bound expressly by name; an executor only represents the person of the testator (*a*), and upon *Nil dicit* a general judgment, (*b*) and so are several cases, 2 *Rolls Abr. tit.* "Heir," and a special judgment would have been erroneous, unless prayed by the plaintiff.

* [79]

And by HIM, GREGORY, and EYRES Justices, (against DOLBIN's opinion) judgment was affirmed.

(a) Perrott v. Austin, Cro. Eliz. 252.
See vide 3 Burr. 1383.

(b) By 3 & 4 Will. & Mary, c. 14. s. 6.
"Where any action of debt upon any spe-
cialty is brought against any heir, he
may plead *riens per descens* at the time
of the original writ brought or bill filed
against him; and the plaintiff may re-
ply that he had lands, tenements, and
hereditaments from his ancestor, before
the original writ brought or bill filed;
and if, upon issue joined thereon, it
shall be found for the plaintiff, the jury

"shall enquire of the value of the lands,
&c. so descended, and thereupon judg-
ment shall be given against such heir,
and execution to the value of the land as
if the same were his own proper debt.
But if judgment be given against such
heir by confession, without confessing
assets descended, or upon demurrer, or
nihil dicit, it shall be for the debt and
damages, without any writ to enquire of
the lands, tenements, or hereditaments
so descended."—See 1 Barnes 329. Bul-
ler N. P. 176.

Case 80.

Coleman *against* Sherwyn.*Hoc Termino*, MOORE Attorney.

Covenant lies on the word "*demise*;" and if a breach be assigned that the covenant or *and another* by his command entered; a plea traversing the entry *modo et forma* is good.

S. C. Salk. 137.
S. C. Comb. 163.
S. C. Carth. 97.

COVENANT on the word "*Demise*." Breach that the defendant, and another by his command did enter, &c. The defendant in his plea traverses, *ABSQUE HOC* that the defendant and the other did enter *modo et forma*, &c. Demurrer.

Plea argued to be ill, because if either did enter it is a good breach, and therefore the traverse is ill

E CONTRA it is a joint covenant. Three demise, and none have any thing. Covenant ought to be brought against all of them. They say that the defendant and two more let the land by deed poll, and aver, that J. S. was seized in fee and so by their own shewing there was no estate; now the covenant in law must be fixed upon some estate, and so is *Ware's case*, 1 *Rolls Abr.* 520.

THE COURT. The case of *Holder v. Taylor* in *Hobert (a)* is express, that covenant lies upon the word *dimise*, and so is *Fitzherbert*, tit' "*Covenant*," if the lessor himself do enter, &c. As to the other point: three do demise, one enters; this is well enough, for it is his own act, and in construction each did demise; it is a general covenant as to their own acts, and the traverse is good, for he traverses it as the breach is laid, and in a special issue you need not say, *nec eorum aliquis*, as you must upon a general issue.

AND THE COURT did accordingly hold both declaration and plea to be good, and therefore the demurrer ill. Judgment for the defendant.

(a) Hob. 12. 1 Brownl. 23.

Case 81.

* [80]

* Trevillian *against* Seccombe.*Trinity Term*, 3 Jac. 2. Roll 788.

Several outlawries of the plaintiff cannot be pleaded in abatement.

S. C. Comb. 162.
S. C. Carth. 8.
S. C. Holt 543.
Theol. Dig. Bk.
25. c. 3.
42 Ed. 3. pl. 19.
Lutw. 1593.
Hob. 249.

CASE. The defendant pleads seven several outlawries of the plaintiff in several actions in abatement; and to this the plaintiff demurs.

And urged that it was ill, and that doubleness of plea is a fault in all pleas in abatement as well as in barr.

E contra urged *per* TREMAIN, that in Easter Term, 25 Car. 2. against *Vaughan* in this court (a), two outlawries were pleaded; and upon his importunity *adjournatur*.

Though *PER CURIAM*, you may as well plead twenty several excommunications, whereas any one disables; suppose one of

(a) Easter Term, 25 Car. 2 Roll 25.

the

the outlawries be ill pleaded, who shall have judgment: *Sed adjournatur.* (b) TREVILLIAM
v.
SECORNE.

(b) Afterwards judgment was given that the defendant should answer over for dupli-
city. S. C. Carth. 8. S. C. Holt 543.
S. C. Comb. 162.

Symphon *against* Inhabitants of Penryth, &c.

Case 82.

DISTRINGAS for throwing down fences, &c. quashed, because there were not fifteen days between the *teste* and return. Then moved to be amended: But *PER CURIAM* all mistakes in not following of instructions are not amendable by the statute of 8 Hen. 6. c. 12. but such only as are proper to arise from the direction of the party: as "*debet et detinet*" where it ought not to be, is not amendable: the *teste* of an original is not amendable, because it is not form; and because it is not from the instruction of the client, but a mistake of the law. And denied to be amended. In 1 *Roll Abr.* 200. *pl.* 34. a writ of entry *tested* 14 February, returnable *octabis pur'* not amendable. (a)

There must be fifteen days between the *teste* and the return of a *distringas*, on a *noctanter*; and a defect in this respect is not amendable.
Co. Lit. 134.
Theol. Dig. Bk. 10. c. 22.
2 Inst. 146.
Lutw. 25.
6 Mod. 146.

1 Salk. 63. 2 Will. 117. Barnes 76. 409. Stra. 765.

(a) See 16 Car. 1. c. 6. and 24 Geo. 2. c. 43.

Chamlet and his Wife *against* Griffin.

Case 83.

CASE for words spoken at *several times*. And moved, in arrest of judgment, that some were not actionable. HOOPER prayed judgment, because admitting that, yet if the latter words are of the same sense explanatory of the former, it will be well enough, though of themselves they are not actionable; and that was the difference in the case of *Faxon v. Tanner* in *Cro. Car.* 236. (a) *adjournat'—Quere de hoc.*

2y. If intire damages may be assessed for words when some of them are not actionable.

Cro. Eliz. 329. 787. *Cro. Jac.* 115. 143. 2 *Bac. Abr.* 7. 2 *Com. Dig.* 624. *Dougl.* 377. 730. 3 *Term Rep.* 433.

1 *Roll Abr.* 576.
Moer 142.
10 *Co.* 130. 132.

(a) See also *Penfon v. Gooday*, *Cro. Car.* 327.

Case 84.

* [81]

In debt on 2 & 3 Edw. 6. c. 13. no *capiatur* shall be entered against the defendant.

Cro. Jac. 348.

1 Roll Abr. 223. 4 Com. Dig. "Leet," (E. 8.)

* Bickerstaff against Holden.

DEBT on the statute of tythes, the 2 & 3 Edw. 6. c. 13. **PER CURIAM**, no need of a *capiatur*, because it is not *transg' et contempt*. Notwithstanding *Beecher's case*, 8 Co. 58. (a) In the case of *Oldfield v. Lee*, inhabitants of *Wisherley*, held well enough without it. (b.)

(a) Jenk. 283. Cro. Jac. 211. 1 Danv. Abr. 472.

(b) And by 5 & 6 Will. & Mary, c. 12. in trespass, ejectment, assault, or false imprisonment, no fine, or *capiatur pro fine*, shall be charged, but the plaintiff, in sa-

tisfaction of it, shall pay 6s. 8d. on the judgment, which shall be allowed him in costs: and since this statute no fine or *capiatur* is entered in the King's Bench; and in the Common Pleas, the entry is "*Nil de fine quia remittitur per statutum*." Salk. 54.

Case 85.

Bradshaw against Swanston.

Prohibition.

S. C. Carth. 70.

S. C. Holt 671.

Yelv. 94. Cro.

Eliz. 188. 249.

1 Term Rep. 552.

2 Term Rep. 473.

PROHIBITION denied in a suit for tythes on suggestion of a *composition*, for **PER CURIAM**, the law hath been taken otherwise.

Cro. Jac. 137. Hob. 176. 2 Roll Abr. 63. Raym. 14. 2 Lev. 24. Dougl. 378.

Case 86.

Parker against Gage.

Heriot service due by ancient tenure may be *fined* out of the manor; but not a heriot reserved by deed.

S. C. Holt 337.

27 Aff. 24.

8 Hen. 7. pl. 10.

Plow. 96.

Cro. Car. 260.

Co. Lit. 149.

8 Co. 105.

2 Brownl. 294.

Kely. 167.

1 Salk. 356.

2 Mod. 93.

2 Saund. 167.

2 Com. Dig. "Copyhold" (K. 21.) (K. 25.) and

see the case of *Osbourne v. Steward*, Latw. 1366.

3 Mod. 230.

TROVER. On Not guilty, a trial before **CHIEF JUSTICE** **HOLT**. The question being about an horse, seized for a heriot. Held by **HOLT**, that either *heriot service* or heriot *custom* is seizable off the manor, because it lies *en prender*; an heriot service is founded on ancient tenure. A *suit heriot* reserved by deed cannot be taken off the manor.

Case 87.

Saunderfon against Nicholle.

In debt the plea of *plene administravit*, admits the debt, but not in *assumpsit*.

What evidence may be given on *plene administravit*.

S. C. Holt 304.

Co. Lit. 283.

UPON evidence ruled by **HOLT Chief Justice**, that in debt *plene administravit* admits the debt, but otherwise in an action on the case, or in an *indebitus assumpsit*, for there the plaintiff must prove the debt.

And *per HOLT Chief Justice*, in proof of a *plene administravit*, if the action be debt on a bond, and you offer payment of a bond, on *plene administravit*, proof must be it was a debt by bond, that it was sealed and delivered; but to debt on simple contract you need only prove payment, because if no bond it is a good administration in that action.

* Hilary Term,

• [82]

The First of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Thursby against Halburt.

Case 88.

Michaelmas Term, 1 Will. & Mary, Roll 435.

DEBT on a bond with condition to perform an award. The award is that the defendant shall seal and execute a bond with sureties of the penalty of two hundred pounds, for payment of one hundred pounds, and thereupon the plaintiff to release. On *Nul tiel award* pleaded, the breach assigned was that the defendant did not become bound. Verdict for the plaintiff.

If arbitrators award that one party shall give a bond with sureties, and the other shall release; it is only bad as to the sureties; and on the one giving his own bond, the other is bound to release.

Sir FRANCIS PEMBERTON *Serjeant* moved in arrest of judgment that there was no good award, for that it was void; being concerning the act of a stranger.

S. C. 3 Mod. 272. S. C. Carth. 159. See the Year Books, 19 Edw. 4. pl. 1. 18 Edw. 4. pl. 23. Cro. Eliz. 432. 1 Roll Abr. 7. 1 Roll Rep. 270. 2 Lev. 6. 3 Leon. 62. 12 Mod. 129. 20 Mod. 205. 8 Mod. 212. Comy. 183. Ld. Ray. 123. 246. Kyd on Awards, 166.

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THURSBY
v.
HALBURT.

An award on
one side only is
bad.

PER CURIAM. It is void only as to the sureties, but good so as to bind the party to become bound.

PEMBERTON *Serjeant*. Then it is only an award on one side, for the release is not to be given, but upon sealing such bond, and such bond with sureties never being to be sealed, there is not to be any release, and consequently the award void; and cited the case of *Barnes v. Fairchild*, in 1 *Roll. Abr.* 259. Award that A. and his son should pass an estate, and that eight pounds should be paid, &c; and in arrest of judgment held ill, because void as to the son being no party; and that being the consideration why the money was to be paid, and the money being to be paid in consideration of such assurance the award is void, though there be other consideration on both parts in the award.

And PER CURIAM the principal case stayed till moved on the other side. *Vide postea.* (a)

(a) In S. C. Carthew 159, it is said that judgment was given for the plaintiff, for that although the award was void as to the sureties, they being strangers to the submission, yet that the defendant was thereby obliged to give his own bond, and the plaintiff, on such bond being delivered, to give

the release. But S. C. 3 Mod. 273. says that the Court held the award void, because if the defendant did not give a bond with sureties, the plaintiff was not bound to make a release, and so the award was only on one side.

Case 89.

* [83]

* King against Dilliston.

Hilary Term, 2 & 3 Jac. 2. *Roll.* 494.

A custom of a manor, that "if a surrender be made of a copyhold tenement, to the use of another and his heirs, and he do not come in to be admitted after three proclamations at three courts, the bailiff of the manor may, by command of the lord seize such tenement as forfeited," does not bind an infant.

ERROR on a judgment upon a special verdict in ejectment in the Common Pleas. It was now argued by the judges *seriatim*.

EYRES *Justice*. The point is whether *John Freeman* the infant be bound by this custom so as to make a seizure or forfeiture. The Court of Common Pleas have adjudged it for the defendants, and I think well, and that judgment must be affirmed.—FIRST, I take it that we cannot intend this seizure found in this special verdict any otherwise than as an absolute forfeiture, and not a temporary one; there is no qualification found, for we must intend it as they have found it; they are two distinct customs in their nature: it is true, a reasonable intendment is to be made upon a verdict, but that must be where nothing is found to impugn it, *Hob.* 262. and the case of *Morice v. Prince*, *Cro. Car.* 521. is express that we cannot intend any thing otherwise than they have found it; as demand and denial of rent found shall not be intended upon the land: the same is in 2 *Rolls Abr.* 698. In *Ashfield's case*, *Jones* 157. an infant copyholder makes a feoffment in fee, it is no forfeiture at all, but when he pleases he may enter. If the custom had been expressly

S. C. Anre 31. S. C. 3 Mod. 221. S. C. Salk. 386. S. C. Holt 158. S. C. Comb. 118. S. C. Carth. 41. S. C. 1 Lut. 765. S. C. N. Lut. 258. 2 Inst. 382. 8 Co. 100. *Cro. Car.* 7. *Jones* 157. *Larch* 199. *Cro. Eliz.* 351. 1 *Leon.* 266. 2 *Leon.* 239. 3 *Leon.* 221. 2 *Vern.* 342. 367. 537. *Comy.* 71. 84. 10 *Mod.* 245. 11 *Mod.* 18. 53. 57. 12 *Mod.* 123. *Precc. Ch.* 568. 3 *Peer Wms.* 151. 309. 352. *Sura.* 94. 168. 654. *Ld. Ray.* 777. 1145. 1 *Peer Wms.* 16. 280.

found, that if an infant or man of full age do not come in it shall be a forfeiture, this had been good, for an express custom may bind an infant; and so is *Seeme's case*, 1 *Leon.* 266. of the lord's appointing one to receive the profits during non-age: so it is in the case of an office, a condition express will bind an infant. *Whittingham's case*, 8 *Co.* 44. So *Co. Lit.* 246. Infancy shall be no privilege where the public repose of the realm is concerned, or against the king. The question is only whether this custom as here found generally will bind, or doth extend to an infant; and I think it doth not, because he is not by express words within it. First, the rights of infants are much favoured, *Co. Lit.* 246. and the reason is the presumption in law, that the infant doth not know his right. An infant shall have his age in a *cessavit*; that I think is the better opinion upon comparison of the books, though some seem against it, 2 *Inst.* 401. 9 *Co.* 85. *Co. Lit.* 380. It is true, in some cases an infant hath no privilege, as in case of church, life, and liberty, *Co. Lit.* 233, 234. Where the statutes give a remedy by an * action he is bound, otherwise where an entry is given, as in case of the statute of mortmain. A general custom shall not bind an infant. All customs are to have a reasonable intendment, as if a custom be for an infant to make a feoffment, an infant tenant in tail cannot do it, but only a tenant in fee-simple, 1 *Rolls Abr.* 567. *Yelv.* 1. *Cro. Eliz.* 879. Remainder man not bound by the custom, because it must be taken strictly. In *Sir Richard Lechford's case*, 8 *Co.* 99. the custom is to be intended, so as the heir be of full age, found memory, and out of prison. Infants are exempt by reasonable construction out of statutes, though within the general words, *St. Merton*, cap. 6. *Stowell's case*, *Plowd.* 364. Infant is not within the meaning of the custom, he is not within the words of it; for that is for those that had a right to come in after such a surrender. Now the infant was not the man who had the right to come in then, but the father. He is here found to have no other title than that of son and heir to his father. A copyhold shall descend according to the common rules of the law, unless particular custom alter and order it otherwise, and therefore the infant is not within either meaning as to a temporary or absolute forfeiture. Infant is not within other customs, and so is *Affiz.* 5. 1 *Rolls Abr.* 567. *Jones* 157. *Noy* 92. There is no necessity to construe the infant within this custom, there being no prejudice to the lady of the manor; for it is not found that the lady was to have a fine, and we cannot intend it being matter of fact not found by the jury, and no fine is found to be due; the lady wants not a tenant, for till admittance the surrenderor continues tenant, and from him she is to have her rights and services, *Cro. Eliz.* 346. *Yelv.* 16. I take *Sir Richard Lechford's case* to be express, for our case is in the nature of a descent as theirs was, ours is stronger; there the alteration was by the act of God, to which the lord of the manor was no way privy, but here it is by their own concurrence, viz. accepting the surrender: the case of *Rumney v. Eves*, 1 *Leon.* 100. is express, that an infant is not bound to come to any court for admittance during his non-age. The same in the case of *Anderjon v. Heywood*, 3 *Leon.*

* [84]

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v.
DILLISTON.

221. I am apt to deny the opinion of JUSTICE WILLIAMS in *Croke*, which is an opinion *oliter*, and to which the other judges speak nothing, nor is it mentioned by *Croke*. I conclude the judgment in the Common Pleas is well given.

• [85]

* GREGORY *Justice*. Whether the right of the infant be forfeited by reason of his non-claim is the question: and I conceive his right is not forfeited. If the surrenderee die before admittance, the heir shall have the land, 2 *Sid.* 37. 61. *Blunt v. Clerk*, the heir hath such a right to keep the possession against the lord, that he cannot be removed till he do some act to forfeit it: the interest of the surrenderor is bound by the presentment of the surrender in court; his interest is determined by the presentment; for till then it is no conveyance; but after presentment the lord is bound to take notice of it: and it lies not in the power of the surrenderor to do any act to weaken his surrender. And so is *Burgoine v. Spalding*, *Cro. Car.* 283. and in 1 *Roils Abr.* 500. it is said the estate remains in the surrenderor till presentment; and from thence he inferred, that after presentment it was in the surrenderee, because the lord was bound to admit according to it: *Quære consequentiam, car le ley est autrement*, and so agreed by all the other judges. Here is nothing but the title of the infant concerned in the question, so that here the infant being the person concerned by reason of such his infancy is not to be presumed able to prosecute his claim; he cited *Noy* 92. *Jones* 157. of an infant's feoffment not making a forfeiture: and if voluntary acts shall not prejudice an infant, much less shall an omission damage him: here is a customary right descended to him, and the jury have expressly found it so, and therefore an infant cannot reasonably be presumed within the custom.

DOLBIN *Justice*. The judgment ought to be affirmed. Copyhold lands are surrendered out of court to the use of one *Freeman* and his heirs. *Freeman* dies before the next court, then the surrender is presented, and the infant does not come after three proclamations, and then the custom is found, &c. The question is whether an infant be bound by this custom: and I take it the infant is out of it by the reason and construction of the law; and I cannot agree with my BROTHER EYRE, that a custom to bar an infant expressly would bind him, for I think it would be void: but that is not our case. This is agreeable to the reason of the law in other cases; a fine at common law barred all people that did not claim within a year and a day, but an infant was excepted: I argue from the reason of that case. It is the justice of the common law to privilege infancy, as in *Stowell's case*: to make an infant or madman to use reason that have no reason, would be an unreasonable thing: in the *Doctor and Student* an * infant is excused by the law of reason, now if he shall be exempted out of the common law, much more from a special custom. Here is the case of an heir of a surrenderee, which is stronger than where the heir of a copyholder is an infant, for there the lord wants a tenant, here he doth not, for without my BROTHER GREGORY's opinion, I take it, the surrenderor continues tenant. The custom and usage of most copyholders is so. I was steward
of

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of twenty six copyhold manors, and in every one of them was this custom. Our constant entry was *nulla proclamatio quia infans*.—

OBJECTION. It shall be a forfeiture *quousque*, and when he comes and tenders his fine he shall be then admitted, and though the custom be found generally, the law shall make such a reasonable construction. I ANSWER, not. I take it that an infant is generally out of it, and those who argue on the other side do say that an infant is exempted in part, why not then in the whole? By the common law, for a fine he needed not have claimed within a year and a day, why then should he not have time here after he comes of age, where he is exempt generally?—OBJECTION. The lord then shall lose his fine. ANSWER. No fine is due till admittance, and so he cannot properly be said to lose that which he never had. But consider the loss of the infant's inheritance, and set it in the scale with the lord's fine; the lord hath only the fine delayed till the infant comes of age: by most copyhold customs the lord appoints a guardian for an infant, and himself is bound to come in within three proclamations after he is of age, and he can have no estate, because he cannot be tenant by the custom till he be admitted; but when he is admitted, I think the lord may set a fine with regard to the time of his delay of being admitted; as four years for instance instead of two. In some manors, as *Harrow on the Hill*, (a) if a stranger purchase land he shall pay five or six years value for a fine, but a copyholder shall only pay two pence, or the like; and a lord may increase his fine upon this account as well as upon that. As to the case of *Stowel v. Zouch*, (b) that will not reach us, for that is not grounded on 4 *Hen. 7. c. 24.* which was to destroy claims. The opinion of *Dyer*, (c) That there are many manors in England where the custom is, that non-admittance within a year and a day shall forfeit, though an infant, is his opinion; but I think that he is out of the custom: * besides as to the finding of this verdict, here is no title found, it is not found that the land shall be forfeited, but only that the bailiff shall enter and seize as forfeited, and without a forfeiture the lord cannot maintain an ejectment, &c.

* [87]

LORD CHIEF JUSTICE HOLT, *e contra*. My brothers have argued very much upon the privileges of infants, most of which I do agree to. But that which governs my opinion is this, That during and until the heir of the surrenderee be admitted, the estate of the copyhold remains in the surrenderor, and then the estate of the lord remaining in the surrenderor, the infancy of the heir of the surrenderee cannot affect this case. (d) The surrenderee, till admittance, hath neither *jus in re* nor *ad rem*, nor hath the party any remedy if the lord refuse to admit. (e) So that it is plain the infant till admittance is a mere stranger to the estate, and that being considered, it is very strange that his infancy shall protect another

(a) See the case of *Hayes v. Croyden*.

(b) *Plowd.* 355.

(c) *Dyer Rep.*

(d) *Berry v. Green*, *Yc. v.* 145. S. C. *Chr. Eliz.* 349. *Gilb. Ten.* 290. 1 *Burr.*

206. 1 *Term Rep.* 261. 2 *Term Rep.* 198.

(e) *Ford v. Holkins*, *Cro. Jac.* 368. S. C. 2 *Bull.* 336.

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v.
WILLISTON.

• [88]

man's estate. If an infant make a feoffment and die without heir, the feoffment is void, and none shall take advantage of the infancy; the lord by escheat shall not, because a stranger. If an infant tenant in tail make a feoffment and die without issue, none that are strangers in blood shall take advantage of the infancy, and here the surrenderor, whose estate the land is, is a mere stranger. The infant is at no prejudice. Is it any more to the infant's loss, or disadvantage, whether the lord or the surrenderor have the profits? The forfeiture is committed by the surrenderor, not by the infant; i. e. in making such an estate to such a man who will not come in and take it up: and why should he enjoy against the lord? It is a forfeiture, but defeazable. FIRST, because it is a condition annexed to the estate, this being the custom of the manor it is the law of the place, and being copyhold he must perform the conditions required. Infant making a lease for years, it is a forfeiture but voidable by an entry when he please. (f) This custom that obliges the infant is to intitle the lord to a fine. Infancy shall be extended to delay a remedy but never to endanger it, and here a fine is incident by the common law to all copyholds; suppose the infant die the lord can never have consideration of his former fine. Where the ancestor is bound, and a remedy is to be had against an infant, he shall have his age, because he shall not be intangled in business; but that is only a delay: where an * infant has right, as if a discent be cast, his right shall not be taken away by a wrong doer through his laches: but here is a quite different case, the lord is in danger of losing his fine. A *feme covert* is heir to a copyholder, and there are three proclamations made, and she and her husband do not come in; the lord shall seize: and it is a forfeiture during the coverture. (g) The reason of coverture is the same with that of infancy; if you save it to an infant you must save it to a *feme covert*, for there is no difference. *Sir Richard Lechford's case* (h) hath been insisted on as an authority in the point, the case is certainly law. If he come in and pray to be admitted, he shall be so, and so here. CROKE Justice (i) held the heir bound though beyond sea. WILLIAMS Justice, who argued it first, said the lord is at no mischief and may seize *quousque*; and take profits *quousque*, &c. I look upon it as the agreement of all the judges. As to the case of *Rumney v. Eves*, 1 Leon. 100. (k) that was not the point in question, but a saying no ways necessary to the case. No man is bound to come in, but only, if and when there are proclamations. An infant freeholder that holds by knight service, the lord shall take the profits. There is no more reason for that than for this of base villenage. The reason of the other is, because it is an incident to the tenure. Is it not so here in this case? The reason why the law takes care of infants is to preserve the inheritance not the mean profits; here is no loss to the infant's

(f) Latch. 199.

(g) *Saverne v. Smith*, Cro. Car. 7.
S. C. 2 Roll Rep. 344. 361. 372. S. C.
Patm. 383. S. C. Bendl. 131. S. C.
Godb. 345.

(h) 8 Co. 99. Godb. 268.

(i) Cro. Jac. 226.

(k) S. C. Co. Cop. 75.

inheritance in this case, nor any benefit to him by the other construction, but only to the surrenderor: wherefore I am of opinion that the judgment is ill; but because all my brothers are of another mind, it must be affirmed.

KING
v.
DILLISTON.

Lee against Libb.

Case 90.

See the Case and the Arguments ante, 68.

HOLT Chief Justice now delivered the opinion of THE COURT. The question on this special verdict is, if this be a good will. We are all of opinion, that this is not a good will within the statute: here is a bequest, a devise not attested by three witnesses. The act requires that the party sign the will in the presence of three witnesses, the third witness is not a witness to the first, and cannot prove the first, whereas the three witnesses are to prove all things the statute requires. Judgment for the plaintiff.

A will attested by two witnesses and a codicil confirming the will attested by one witness is not good.

S. C. ante, 68.
S. C. 1 Eq. Abr. 402.
S. C. 3 Mod.
S. C. Holt. 742.

362. S. C. 3 Salk. 395. S. C. Comb. 174. S. C. Carth. 35. S. C. Rep. Eq. 263.

* Edlestone against Speake.

Case 91.

Trinity Term, 1 Will. & Mary, Roll 243.

[* 89]

EJECTMENT. Special Verdict. Upon a trial at the bar the jury find that the plaintiff's lessor is heir at law to J. S. That J. S. by will according to the statute devised the lands in question to the defendant. Then they find another writing published by the testator, as his last will, in the presence of three witnesses, revoking all other and former wills, and that the witnesses to this last subscribed their names thereto in the hall adjoining to the room where she was, but in such a place that she could not see the witnesses, which last writing gave the same land to the defendant. *Et fi, &c.*

If a good will devise lands, and another will devise the same lands to the same person; but is not attested by three witnesses in the presence of the testator; this second is no revocation of the first will.

WILLIAMS argued for the plaintiff, That this last is a good writing to revoke within the clause in the statute 29 Car. 2. c. 3. of frauds and perjuries, (a) though it be not a good will to pass lands: I agree it no good will, because the witnesses did not sub-

S. C. 3 Mod. 218. 258.
S. C. Carth. 79.
S. C. Comb. 156.
S. C. Holt. 222.

Post. 537. Hard. 374. 1 Roll Abr. 614. Cro. Eliz. 721. Cro. Jac. 94. Comb. 90. 3 Atk. 798. 3 Mod. 203. 1 Peer Wms. 239. 343. 2 Salk. 592. 2 Burr. 1690. 8 Viner Abr. 140. 3 Com. Dig. 23. Cowp. 87. Dougl. 31. 40.

(a) By 29 Car. 2. c. 3. s. 6. "no devise in writing of lands, tenements, or hereditaments, nor any clause thereof shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent. But all devises and bequests of

"lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same."

EDLESTONE
v.
SPRAKE.

scribe their names in the testator's presence, and therefore the devise is a void devise of *the lands* in question; that is a requisite necessary by a positive law, and not to be helped by any construction or other intendment; it is a constitutive law, and therefore strictly to be pursued; but though it be void as to a devise of the lands, yet it is a good revocation within the words of that clause, "that no will shall be revoked, but by some will or other writing, declaring the same." Here is a writing declaring the same; the clause about wills is cautiously penned, it doth not make the will void for want of subscription of witnesses, it is only "all bequests of lands shall be void;" so that it remains still as a will, and it being a will, and declaring all other wills to be revoked, it is a will to all other purposes except a devise of land: it is a writing within the clause of revocation, it hath all the circumstances required in and by that clause. A little thing would make a revocation formerly; by the 32 Hen. 8. c. 1. of wills there is nothing of what shall be a revocation, and *Dyer* 143. a revocation might be by word of mouth. If there be facts inconsistent with an intention or will to give the land, they make a revocation; as the sale of land is a revocation, though when it is repurchased a republication will do. A will is but an ambulatory instrument, an inchoate act that may be repealed by a very small matter: upon this act, * if a man make a will according to these circumstances, a feoffment will be no revocation, for it is not within the express words of this clause, but ours observes that clause intirely. A devise by parol was void as to make a devise; yet before this statute it was a revocation. A feoffment without execution was held a countermand of a will in the case of *Montague v. Jeffery* 429. the same in 1 *Rolls Abr.* 514, 515. A devise to persons incapable of taking, though void, is deemed a revocation, and *pari ratione* here: to though no good will, yet it is a revocation.

• [90]

Mr. FINCH *è contra*, It is not said to be in her presence: but however I will agree it not a good will, and we claim by the other: and if this second be an alteration, it must be as a good will, and then the land is ours that way too; or else, as it is a writing, it is no alteration as it is a will: the first is a devise of lands, and now that cannot be altered but by a will that concerns the same thing, *viz.* a devise of the lands another way, and this is not pretended to: how can a will be called a will when every devise in it is void? A will concerning land cannot be good if the devise of that land be void, and a will concerning land cannot be revoked, but by another will concerning the same land, and therefore the last will being void as to the land it is no revocation. The intent was to prevent the mischief of parol revocation; now here is no will that hath revoked it. Then here is another writing; now this is no writing within the meaning of the act, for the meaning is a writing operating as a will. A man has a power of revocation by deed or writing, and he makes a will, this is a writing: and yet it is no present revocation, though it be a writing; this last confirms the devise of the former, and how that can be a revocation is hard to be imagined. To make a revocation it must be a writing declaring
his

his intention to make the devise void, whereas here his intention is to make a will confirming of the former; his intention here was to declare it a revocation no otherwise than as a will, and then he intended it to confirm the first. And so he concluded it no revocation.

EDLESTONE
v.
SPRANK.

HOLT *Chief Justice* to Mr. WILLIAMS. Is this an act inconsistent with the first devise of the land, or doth this any ways contract his former intention of giving the land to the defendant?

And afterwards judgment was given for the defendant. (b)

* NOTE, It was said by HOLT *Chief Justice*, and not denied by the rest of THE COURT, that if a devise be to A. and B. and their heirs, and A. die before the testator, the other shall have the whole by survivorship.

* [91]
On a devise to two; if one die before the testator, the survivor takes the whole.

whole.—Plowd. 344. 1 Co. 100. Cro. Eliz. 423. Caf. in Chan. 121. Salk. 438. and see the case of Davis v. Kempe, Carter, 2. Goodright v. Wright, 1 Stra. 25. 1 Peer Wms. 397. Cowp. 257.

(b) In the case of Glazier v. Glazier, 4 Burr. 2512. The testator, in the year 1757, made a will of lands; and, in the year 1763, made another will, in which he gave land to the same devisee. Both wills were found in the testator's custody at the time of his death; the second cancelled;

and the first uncanceled. The question was whether the cancelling of the second will was not a revocation of the first. The Court were of opinion that it was not a revocation. See the case of Hide v. Mason, 8 Viner Abr. 140. See also Harwood v. Goodright, Cowp. 87.

Nightingale against Adams.

Case 92.

HELD by POLLEXFEN *Chief Justice* upon evidence in this case at GUILDHALL, in a replevin for goods taken by order of the East-India company, as interlopers in the Indies, that no replevin lies for goods taken beyond the seas, though brought hither by the defendant afterwards.

Replevin does not lie for goods taken beyond the seas, though afterwards brought into England.

S. C. Holt, 426. 5 Com. Dig. 435. 4 Bac. Abr. 385. 4 Term. Rep. 503.

Anonymous.

NOTE, That if a woman give a *warrant of attorney* and then marries, you may file a bill, and enter judgment against both by the practice of the court. Ruled upon motion. (a)

Judgment may be entered against husband and wife, on the WARRANT of

the wife *dum sola*.——1 Salk. 117. 399. 12 Mod. 383. 3 Burr. 1469.

(a) But see the case of Madder and his wife v. Lee, 3 Burr. 1469. by which it seems that before judgment is entered,

leave to enter it must be obtained from the court, on an affidavit proving the marriage. See also 1 Term Rep. 486.

Anonymous.

Anonymous.

Ireland is beyond sea, within the statute of limitations. Held by *HOLT Chief Justice*, upon the statute of limitations, 21 Jac. 1. c. 16. That *Dublin* or any other place in *Ireland* is beyond sea within the meaning of that clause in that statute: ruled so by him upon consideration.
 Corp. 658.
 Sec 4 Ann. c. 16. Post 99.

Memorandum.

Error in the declaration cannot be urged on plea in abatement. In the case of *Chambers v. Garret*, this term, *HOLT Chief Justice* refused to permit me to urge or argue any exception to a declaration upon a demurrer to a plea in abatement.
 Co. Lit. 303. 3 Co. 120. Hob. 233. 1 Salk. 212.

Easter

* Easter Term,

* [92]

The Second of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.* } *Justices.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Price against Langford.

Cafe 93.

Hilary Term, 2 & 3 Jac. 2. Roll 1059.

EJECTMENT. Special verdict. The case was, that J. S. was seized of lands in fee, as heir of the part of his mother, and he and his wife, with warranty, levy a fine, to J. N. and J. D. and they by the same fine do grant and render, to the use of the husband and wife, and the heirs of their two bodies, remainder to the right heirs of the husband.

If husband and wife levy a fine *sur done, grant, et render* of lands of which the husband is seized in fee *ex parte materna*, and take back an estate to them and the heirs of their bodies, the nature of the de-

The question was, if this did alter the descent or change the estate so as to make the heirs by his father to be inheritable?

feut is thereby altered, and the estate, on their dying without such issue, shall descend to the heirs of the husband *ex parte paterna*. — S. C. Salk. 337. S. C. Carth. 140. S. C. Holt. 253. Co. Lit. 12, 13. Hob. 31. 1 Co. 120. Mod. Caf. 45. 1 Atk. 480. 3 Com. Dig. "Descent" (c. 7.) Cruise on Fines, 47, 48. 1 Salk. 337. 2 Stra. 1179. 1 Will. 2. 66. 2 Peer Wms. 171. and see the case of *Alston v. Wells* and others, Dougl. 769. 771; and *Hutchinson v. Hammond*, 3 Browne Caf. Ch. 128.

Mr.

PRICE
v.
LANGFORD.

* [93]

Mr. Row for the plaintiff argued, that it did not; that the fine alters no estate, but that it remained as it was before. The law shall reject the new title and judge the heir in of the old: so it is in case of devise to an heir, the law shall reject the devise and judge him in of the estate descended: in a fine *sur grant et render* the conusee passes nothing, but in reality the conusor's intention governs the whole: a *feme covert* need not to be examined in it. (a) An use may be of a fine *sur grant et render*, though the opinion was otherwise formerly. (b) If the conusee of such a fine were lessee for years, that would not extinguish the term, and that is an argument he hath no possession. (c) A conusee of such a fine cannot forfeit: suppose the conusee of such a fine were a villain to the king, might the king have seized the land? Suppose he were an abbot, would that be within the statute of mortmain? (d) He cannot bring a *quid juris clamat*, because he hath no estate; there is no instance in which he hath a seizin as to found that writ: it is like the case of a surrender * of a copyhold, and there is never any estate in the lord; he is but an instrument, 1 Leon. 102. In *Lord Cromwell's case*, 2 Co. 69, held there, that the conusee of a fine was most like a demandant in a recovery, who is only a formal instrument for the conveyance of the land, *Dyer* 172. Co. Lit. 365, 366. Then further a fine *sur grant et render* is a fine executory, and here is no execution found; whether he is not put to a *scire facias*, or whether the estate may not be executed by an entry is a *quare*; but if the latter, yet here is no such entry found as will execute this fine, for it is *introvit clamans ut hæret*, and that will not do, *Fitzb. "Scire facias"* 65. An entry *clamans* is not sufficient; it is not every entry that will seem to vest an estate, 1 Saund. 119. Entry in ejectment will not amount to an entry to avoid a fine.

HOOPER *contra*. This doth alter the estate; for THE FIRST INSTITUTE is express, that by a reinféoffment he takes as a new purchaser. He cited as positive and express authority the case of *White v. Geerich*, Cro. Eliz. 727, 792. and *Sir Myle Finch's case*, 6 Co. 63. And as to the case of uses those come not up to this; for the use goes according as the land should have done, if no such conveyance had been. The word "render" *ex vi termini* imports that he had the estate in him. It is true he could not bring a *quid juris clamat*, because the instant it was in him it goes to the other. Then for warranty, it may be annexed to it, Cro. Eliz. 17.

HOLT Chief Justice. The cases of uses come not to it; for before the statute they were but things in equity. It is an estate in the conusee, and the render is a new purchase: now upon an use at common law, he could not reinféoff to the heirs of the part of the mother, because there could be no such use. This is a conveyance at the common law; the conusor now claims under the render: the cases of uses are different. If a féoffment be made to a man attainted

(a) *Dyer* 311. Moor 45.

(b) *Poph.* 104. 3 Leon. 111. 8 Hen.

(c) Cro. Jac. 643. 7 Co. 39. Cro. Car. 191. 15 Edw. 3. Fitz. "Petition," 2.

(d) See 9 Geo. 2. c. 36.

before,

before, and he reinfcoff, the king shall have it; which shews the estate was in him: and this fine and render is a feoffment and re-feoffment at common law.

Price
v.
Langford.

PER TOTAM CURIAM. Judgment was given for the defendant. (c)

(c) The fine *sur done, grant, et render* is the only sort of fine which gives a new estate, Cruise on Fines 71; for if a person seized *ex parte materna* levy a fine *sur cognizance de droit come ces*, and either make no declaration of the uses of it, or declare it to be to the use of himself and his heirs, the lands will still descend *ex parte materna*, because it is still the old use, 2 Peer Wms. 139. 2 Will. 19; and there is no difference whether the use be

express or implied. 2 Salk 590. 3 Lev. 406. For what shall be a *purchase* and break the *discent* so as to intitle the *paternal heir* over the *maternal heir*, see Moor 278. 3 Leon. 64. 70. Dyer 124. Cro. Eliz. 833. 919. Cro. Car. 38. 1 Salk. 241. 8 Mod. 23. 1 Stra. 267. 487. 1 Will. 66. 2 Burr. 871. Viner, "Heir" W. 1. Co. Lit. 12, and Mr. Hargrave's note (2). Dougl. 679. 3 Bro. Chan. Cases 128.

* Aishcome against The Hundred of Spelholme.

Hilary Term, 1 Will. & Mary, Roll 901.

Case 94.

* [94]

TRESPASS. Special Verdict. The point was, That the plaintiff had two servants who had each money in their several portmantzaus, and only one swears the other being a Quaker.

A master may bring an action against the hundred for a robbery from his servant; but, to maintain it the servant must be sworn pursuant to the directions of 27 Eliz. c. 18. and therefore if two servants be robbed and only one sworn, the judgment shall be only for the money that was taken from the other.

The question was if this be sufficient to charge the hundred with the money each had, both being robbed, within the statute of 27 Eliz. c. 18.

S. C. Post. 241.
S. C. Holt. 460.
637.
S. C. 3 Mod. 267.
S. C. Carth. 145.
S. C. Salk. 613.
Stiller, 156. 319.
2 Roll Abr. 685.
pl. 7.
2 Hawk. P. C. 117.
2 Ld. Ray. 826.
829.

It was urged, That this statute had been construed favourably for relief, and that as to notice to the next *ville*, it had been held that it is sufficient for one in the company to give notice, though the words seem literally to mean the party robbed: if a servant be robbed, the master may bring the action, which is only by construction, and cited the case of *Jones v. the hundred of Bromley in Kent*, argued Michaelmas 1658. Ent. Hill. 1656. (a) An action for a robbery committed upon his wife's servants and himself, and the master's money taken from the servant. The question was, if the master's oath were sufficient without the servant's, and held sufficient. GLYN said there needed not several affidavits. It was urged that though the money was in the possession of the servant, it was in construction of the law in the master's possession; now since the master may bring the action, the case is the same: besides the two servants are but as one man.

HOLT Chief Justice. The statute of 27 Eliz. c. 18. is made in favour of the hundred; the master's having the action is by the statute of Winchester, by this the person must take the oath from whom the money was taken. It is true, the master is robbed because of his property, but the servant is the person from whom the money was taken, and this act was never extended by equity against the hundred. As for the case of *Jones*, it is not to the purpose, for there

(a) Carth. 146.

AINCOME
v.
HUNDRED OF
SPELHOULME.

the master was actually present and the party robbed; and so there is a great difference.

THE COURT inclined for the defendant. *Sed. adjournatur. (b)*

The hundred is
not liable if the
robbery be col-
lusive.

AGREED BY ALL, that if on evidence it appears the robbery was by combination, the hundred is not liable.

* [95]

* Memorandum.

In what cases
the contract of
the servant will
bind the master.

UPON evidence in an *assumpsit* for wares sold it was held by HOLT Chief Justice, That if a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the master is not chargeable. But if a servant usually buy for the master upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, the master is chargeable.

1 Brownl. 64.
Plowd. 11.
5 Mod. 398.
2 Vern. 643.
1 Bl. Com. 430.
1 Ld. Ray. 224.

2 Ld. Ray. 928. 10 Mod. 109. 11 Mod. 72.

Memorandum.

Continuance.

NOTE, That the continuances in *Chester* are always general, and have no day certain.

Post. 319.
3 Bulst. 233.
1 Roll Abr. 484.

Dyer, 26a. Cro. Jac. 571. Cro. Eliz. 105. Cro. Carr. 254.

(b) In the Michaelmas Term following THE COURT gave judgment for the plaintiff as to that part taken from the servant who was sworn, S. C. Carth. 146. and for the defendant, as to that part of the money which was taken from the quaker, S. C. Post. 241. S. C. Salk. 613; for

although the money was taken from the constructive possession of the master so as to enable him to bring the action, yet in order to maintain it the servant must be sworn. S. C. 3 Mod. 288. But by 8 Geo. 2. c. 16.

* Trinity Term,

* [96]

The Second of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*
Sir WILLIAM GREGORY, *Knt.* } *Justices.*
Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Brickwood *against* Fanshaw.

Case 95.

Hilary Term, 1 Will. and Mary, Roll 750.

CASE for fees as attorney and solicitor in several causes for the defendant, both here and in the borough court of *Malden* in *Essex*. The defendant pleads the statute of 3 Jac. 1. c. 7. that no bill was delivered under hand. (a) Demurrer. And PER CURIAM held to be out of the statute, because it doth not extend to *inferior courts*. And judgment for the plaintiff.—*Vide Allen 4.* that it doth not extend to case upon a special promise.

The 3 Jac. 1.
c. 7. That
an attorney
shall deliver a
bill, doth not
extend to *inferior*
courts.
S.C. Carth. 147.
S. C. Salk. 86.
Antr, 48.
Doug. 381.

Post. 338. Barnes, 26. 1 Stra. 633. 1 Espinasse Dig. 9.

(a) See 2 Geo. 2. c. 23. s. 23.

Newton

Case 96.

Newton *against* Trigg.*Michasmas Term, 1 Jac. 1. Roll. 226.*

An innkeeper whose general dealing is in oats, hay, straw, &c. for the use of his inn, is not a trader within the statutes of bankrupts, although he is partowner of a ship let out on freight.

S. C. Post. 268.
S. C. 3 Mod. 327.
S. C. 3 Lev. 309.
S. C. Carth. 749.
S. C. Comb. 181.
S. C. Salk. 109.
Cro. Car. 549.
1 Sid. 461. 491.
8 Mod. 46. 48.
12 Mod. 159.
307.
1 Ld. Ray. 287.
2 Ld. Ray. 852.
2 Peer Wms. 308.
2 Stra. 513. 809.
1 Term Rep. 34.

* [97]

TRESPASS. Special Verdict. The point was, if a man who keeps an inn and buys his provender, &c. and vends them in his inn as innkeeper, be within the statutes of bankrupts.

TREMAINE *Serjeant* urged that he is not a trader within them: an innkeeper cannot set his own prices, but is bound to reasonable prices; a tradesman may sell to whom he pleases; an innkeeper cannot refuse his guest, *Cro. Jac.* 609. He doth not get by buying and selling; he gets by the price and hire of his lodgings, by the profit or use of his kitchen; the profits from the stables do not arise from the hay only but from the standing: *Pratt v. Crispe, Cro. Car.* 549. *March* 34. (a) The building of ships makes not a man a trader.

* HOLT *Chief Justice*. An innkeeper seems to be different, for he is not an universal trader to all persons, but only to all travellers that come. Besides, he is not capable of selling at his own prices; for this court or the judges of assize may set them; he has not the liberty of a free trader. But I can see no difference between a London innkeeper and one upon the road in the country.

DOLBIN *Justice*. The reason in the case of *Crispe v. Prat* was, because it was his own hay and his own oats; here it is found he buys all, and therefore different; he hath a stock *pro negociando*.

EYRES *Justice* said, he thought the better opinion to be that he was out of the statute. *Sed adjournatur.* (b)

(a) S. C. W. Jones, 437.

(b) The Court were unanimously of opinion that an innkeeper is not a trader

within the statutes of bankrupts, and therefore gave judgment for the plaintiff. Post. 268.

Case 97.

Mordant *against* Thorold.*Hilary Term, 1 William and Mary, Roll. 340.*

An executor of tenant in dower cannot bring a *scire facias* on a recognizance to pay mean profits on affirmation of judgment.

S. C. 3 Mod. 281.
S. C. 3 Lev. 275.
S. C. Salk. 252.
S. C. Carth. 133.
(2. Y. 19.)

SCIRE FACIAS by the executor of a tenant in dower on a recognizance according to 17 Car. 2. c. to pay the mean profits, if judgment be affirmed. Demurrer.

PEMBERTON. The exception is, that this is a personalty and gone with the person. I say it is become a duty, and the recognizances make it such and ascertain it was such, though there be a *scire facias* requisite to adjust the *quantum*: this is like a covenant, to pay all the profits that should be incurred during the suit; the

S. C. Holt 305. Moor, 679. 1 Sid. 188. 1 Lev. 38. 5 Com. Dig. "Pleader"

scire

scire facias is but ancillary, and help to assist the execution of the recognizance: the case of *Ayleway v. Roberts* will not come up to this, for that was in point of *tort* and not of duty.

MORDANT
v.
THOROLD.

LEVINS *è contra*. In all actions of *tort* it matters not whether plaintiff or defendant dies, all is gone. Will the putting in a recognizance alter the nature of damages by the common law? that is, to make them recoverable where they are not, as here are none, there being a death in the case. Besides, this is not a *scire facias* upon the statute, but at common law for to have the damages ascertained, and the statute gives the recognizance only for what damages were recoverable before.

But by PEMBERTON the statute goes further, it gives damages from the time of the judgment till the affirmance.

HOLT Chief Justice. There can be no suit on this recognizance, till there be a judgment for these damages, and consequently the recognizance doth not any ways alter it. The *scire facias* to ascertain the damages must be as at common law, and the common law rule is *actio personalis moritur cum persona*. Why should not an executor have an action of waste, but only the reason of the common law that it dies with the party. (a) We can award nothing after the parties death, because it doth arise *ex delicto*, and no interest vested till they are assessed. Judgment for the defendant, *nil capiat per breve*.

* [98]

(a) See the case of *Hambly v. Trott*. Cowp. 371.

Syms against Tyms.

Case 98.

DEBT on a judgment, "writ of error pending" pleaded in abatement. Demurrer. Judgment for the plaintiff, for a *respondens auster*, according to the case of *Rottenhoffer v. Lentball*, (a) last term.

A writ of error pending cannot be pleaded in abatement of debt on a judgment.

P.R. 146. Carth. 243. 10 Mod. 17. 1 Ld. Ray. 47. 2 Ld. Raym. 1027. 1 Term Rep. 273.

(a) See Post. 146. and the cases there cited.

Case 99.

Rousby *against* Manning.

If an award be made in writing ready to be delivered by a particular day, it is sufficient to shew that it was made in writing by the day without adding that it was ready to be delivered.

S. C. Carth. 158.

S. C. Post. 242.

S. C. 3 Mod. 330.

Hard. 399.

Cro. Car. 389.

1 Ld. Ray. 115.

D E B T on a bond conditioned to perform an award. *Nul award* pleaded. Replication setting forth the award and breach. Demurrer.

THE EXCEPTION taken was, because he did not say according to the condition, that it was made ready to be delivered to the parties, but only *in scriptis*.

HOLT Chief Justice. It seems unnecessary, for an actual delivery is not requisite by the condition, and a bare making in writing, imports its being ready to be delivered to the parties. *Adjournatur. (a).*

2 Keb. 874. 2 Lev. 68. Lutw. 524. 6 Mod. 82. Freem. 416. Cro. Jac. 578. Kyd on Awards, 195. 2 Ld. Ray. 989. 1449.

(a) Judgment was given for the plaintiff. Post. 242. and see *Jenkinson v. Allansop*, 3 Keb. 513. 556. 1 Freem. 415.

Roberts v. Marriot, 1 Mod. 42. 289. 2 Saund. 73. 188. 1 Lev. 300.

Case 100.

Hall *against* Wyborn.

Michaelmas Term, 1 William and Mary, Roll 641, or 671.

To a plea of the statute of limitations, the plaintiff cannot reply that the defendant was beyond the seas; for the proviso in 21 Jac. 1. c. 16. does not extend to defendants.

S. C. Carth. 136.

S. C. 3 Mod.

311.

S. C. Salk. 420.

Cro. Car. 245.

Post. 341.

2 Lev. 143.

6 Mod. 26.

2 Vern. 694.

2 Lutw. 950.

Cro. Car. 246.

334. 2 Vern. 694.

C A S E. The defendant pleads the statute of limitations, 21 Jac. 1. c. 16. The plaintiff replies, that the defendant was beyond sea. The defendant demurs. The question is if a defendant's being beyond sea did avoid the statute of limitations.

TREMAINE argued that it did; for the law compels no man to actions fruitless; as to sue a man when there can be no fruit of the action, and perhaps never will return. Besides, there is a great fine to the king upon an original and no person in capacity to answer: this is to take advantage of his own laches, which the law will not allow; and there is no reason it should be so then when the plaintiff is out of the realm, for he may sue by attorney or friend though absent; we cannot sue the defendant unless he comes in person, *Swayn v. Stephens, Jones*, 252. *Cro. Car.* 246.

THOMPSON Serjeant for the defendant. The words of the proviso are plain; only to mean the party plaintiff; (a) and cannot extend to the defendant.

Willf. 134. 3 Bac. Abr. 514. 4 Viner's Abr. 236.

* [99]

(a) But if one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of

action arises, *Perry v. Jackson*, Hilary Term, 32 Geo. 3. 4 Term Rep. 516.

DOLBIN

DOLBIN Justice. This hath been an old question and never settled, and doth deserve to be better argued, the quære is not if the defendant be within the proviso, but if within the purview of the act, if when the defendant be beyond sea the act ever intended to bind by six years.

HALL
v.
WYBORN.

HOLT Chief Justice. If a defendant beyond sea be out of the statute, then if he return after the six years he is still out of the statute.

GREGORY Justice. There was the case of *Sir George Bynton v. Evelyn*. (b) The statute of limitations pleaded; replication that the defendant was *per tot tempus præd.* privileged as a parliament man, and demurrer, and held a bar, and that the privilege did not avoid the statute. *Adjournatur fore bene deliberand.* Afterwards judgment was given for the defendant. (c)

(b) Cited Carth. 137.
(c) But now by 4 Ann. c. 16. s. 19.
"if any person who is liable to the ac-
"tions therein mentioned shall be beyond
"the seas, at the time the cause of action
"accrues, the plaintiff shall be at liberty to
"bring his action against such person after
"his return from beyond the seas, so as
"he brings the same within the times li-
"mited by the 21 Jac. 1. c. 16." And
see 5 Geo. 2. c. 25.

Beard and his wife against Franks.

Case 101.

RULED PER CURIAM, that in pleading the last poor prisoners act, you must plead the first act in 1671, and then the last gives the same authority, and that he was in prison the first of May, and it is not enough to plead the last act. And accordingly plea overruled in this case, and judgment given for the plaintiff.

Pleading the
Poor's Act.
1 Term. Rep.
273.

Allen against Darby.

Case 102.

Hilary Term, 1 Will. & Mary, Roll 314.

REPLEVIN *quod cum*, and avowry to it ill, and demurrer. And held **PER CURIAM**, that the defendant could have no return, because his avowry was ill, though the declaration in *replevin* was ill. And therefore the *replevin* was quashed, without judgment for a return.

No return where
the *replevin* and
the *avowry* are
ill.
5 Com. Dig.
Pleader (3 K. 14.)
3 Term Rep.
349.



Case 103.

• The King *against* the Earl of Salisbury.

• [100]

A pardon cannot be pleaded in the King's Bench to an impeachment of high treason by the House of Lords.

THE defendant was committed on an impeachment for treason, in being reconciled to the See of Rome. By the act of pardon, the offence is pardoned the parliament being adjourned.

The defendant was brought hither by *babeas corpus*, and moved to be discharged.

Denied PER CURIAM, because the impeachment is in a superior court, and the pardon must be pleaded there: the commitment was judicially by THE LORDS, and they could not here take cognizance of it.

And so was remanded to THE TOWER.

S. C. Carth. 131.
Plowd. 401.
484.
Hard. 155.
3 Co. 68.
Ray. 381.
Rast. Ent. 665.
Skin. 56. 162.

4 St. Tr. 397. 2 Hawk. P. C. 171. 560. See 12 & 13 Will. 3. c. 2.

* Michaelmas Term,

* [101]

The Second of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.* } *Justice.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Boson *against* Sandford and others.

Case 104.

Hilary Term, 1 & 2 Jac. 2. Roll. 302.

CASE against the defendants as common carriers between *Exeter* and *London* by water in a ship for hire. On "not guilty" a special verdict finds that there was a master of a vessel who acted; that the goods were delivered to him and lost; that the defendants were proprietors; and that here are others not named, &c.

Argued *for the plaintiff*. That this is an action grounded on the *wrong*, and it may be joint or several at the election of the plaintiff;

plaintiffs not naming all the owners. — S. C. 9 Show. 429. S. C. Ante 29. S. C. 3 Mod. 321. S. C. Salk. 440. S. C. 3 Salk. 203. S. C. Comb. 116. S. C. Carth. 58. S. C. Skin. 278. S. C. 1 From. 499.

In an action on the case against some of the partowners of a ship for goods lost by the neglect of the master; the defendants may, on the *general issue*, take advantage of the

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v.
SANDFORD.

for he hath election to bring it either on *the tort* or on *the contract*, and here he hath brought it on the wrong. As it is here, it is purely grounded on the wrong; the contract or charge is but inducement. The gift of the action is the wrong; the non-feazance and neglect. The general issue is *not guilty*. The damages arise from the wrong: a release of any part would release the whole; and cited justice *Morton's case*, (a) that where the action arises *ex delicto, moritur cum persona* (b), the case of *Cole v. Wilkes* (c), *Swallow v. Emerson* (d), and *Muthew v. Hopkins*. (e) We have not relied on the agreement but on the wrong. (f) And further argued, that this ought to have been pleaded in *abatement*, for thereby the plaintiff would not have delayed, but might have come to the knowledge of proper parties. And besides, he ought to have given us a title to a better writ, and cited *Blackbourn v. Graves*. (g) If two tenants in common bring an action, advantage ought to be taken of it by way of plea. And there is no difference between plaintiff and defendant as to that matter: upon an *assumpsit* I do agree it is so, because it is "*non assumpsit modo et forma*," * but otherwise in action upon the right; as debt upon a bond in *Whelpedale's case*, 5 Co. 119. on *non est factum*.

* [102]

TREBY *Attorney General à contra*. If he will bring the action against the owners he must bring it against them all; this sounds in wrong, but it arises from a breach of contract and duty; it is brought against them as proprietors, and this wrong depending upon a breach of contract must be measured by the contract. The contract in law is with the proprietors. The great reason why they are liable, is because they have remedy for the hire. Now they are all to have the hire, and it is unreasonable that all should have the hire, and yet some only pay for the damage: the contract is the matter of the action; the case of *Cole v. Wilkes*, *Hutt.* 122. is, that it must be brought against both the occupiers: here is a personal contract raised by law, and sounds rather like a debt: this can never be a good plea in abatement, for it amounts to the general issue, as in an *assumpsit*, the defendant can never plead that he and another did allume, for it amounts only to the general issue, and may be taken advantage of in evidence: as to the case of a bond it must be agreed to them; but that stands upon a very different reason, because the action arises thereupon, the several fact of every one of the defendants: in its own nature the bond is several; for one man's sealing is not another's sealing; and if the other seal not, it is his bond severally; but here they all appoint the master jointly, they officiate alike.

The next term the judges delivered their opinions *seriatim* for the defendant. DOLBIN *hæsitante*.

(a) Easter Term, 21 Car. 2.
(b) See the case of *Hambly v. Trott*,
Cowp. 371. to 377.
(c) 2 Hutton, 121.
(d) 1 Lev. 161. 1 Sid. 242. Keb. 865.
(e) Easter Term, 16 Car. 2. 1 Sid. 244.
Keb. 852. 870.

(f) See 9 Co. 50. Cro. Car. 539. Savil, 40. Raym. 71.

(g) Trinity Term, 26 Car. 2. entered
Hilary Term, 24 & 25 Car. 2. Roll. 1216.
1 Mod. 102. 120. 1 Vent. 260. 2 Lev.
107. 3 Keb. 263. 329.

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EYRES *Justice*. I agree no difference between a land and water carrier, for both are chargeable, *Nichols v. More, Sid.* 36. The master of the ship by the common law is no more than a servant to the owners, and he hath no power over the ship and goods: the power which he hath is by the civil law, *Hob.* 111. and it is plain the act or default of the servant shall charge the owner; he cited *Dyer* 161. 238. *Plowd.* 11. 8. 2 *Roll. Abr.* 567. *Cro. Eliz.* 711. 4 *Levn.* 123. *Moore* 776. This action ought to have been brought against them all; for they are chargeable only upon the account of the hire, which they all received. It is an action founded *ex quasi contractu*, and the law implies an agreement and contract to have the goods carried safely and without damage. *Southcott's case*, 4 *Co.* 83. That there is such a contract is plain, for they may have a *quantum meruit* for their hire. Now what is in its nature joint the plaintiff cannot sever. In case of an express promise it is plain, *Noy* 135. In case of money levied on a ** fieri facias*, and not answered to the party, the action of debt must be against; all the sheriffs of a city or the coroners of a county; and yet it is grounded on the wrong; but being *ex quasi contractu* it is joint. (b) The verdict hath expressly found that none were present but only their servant, who was the master; and they are only chargeable by implication of law, and therefore equally liable. (i) OBJECTION. That it ought to have been pleaded in abatement. I do agree where one *joint-tenant*, or *tenant in common* brings an action personal, and the defendant pleads in *bar*, he shall never take advantage of it, (t) but I think the defendants could not have pleaded this in abatement, for in the plaintiff's declaration he charges them with an express contract of their own, and then they had been liable without their companions, because of that particular act of their own; and so the defendant could not plead other part owners. It was in the plaintiff's election to charge them either on an express promise, or on the contract implied in law, which could not be disclosed but on evidence. Here he hath not declared according to his case, for it was twenty, and he hath said by three. (l) By verdict a suit may be abated as well as by plea: as to the plaintiff's being a stranger, that is nothing; for he having declared upon an express agreement, he is to do it truly at his peril; and so concluded for the defendant.

* [103]

GREGORY, *ad idem*. The first question is, if the owners be liable and not the master only. I think the master, as this verdict is found, was only a servant. (m) The owners are the carriers; they have the sole profit; and the master hath nothing but certain wages. The master's act doth bind the owners. (n) Then whether they are not equally bound, and consequently if they ought not all of them to be sued. The master was servant to every one of the owners. The plaintiff might have taken notice of all the owners as well as of

(b) 2 *Saund.* 345. 1 *Roll. Abr.* 921. *Hob.* 216. 260.

(i) *Hutr.* 121. 1 *Mod.* 198.

(t) *Moore*, 466. *Cro. Jac.* 183. 1 *Sid.* 49. *Cro. Eliz.* 584. 1 *Mod.* 102.

(l) *Cro. Eliz.* 882. 2 *Roll. Rep.* 350. 26 *Hen. 8.* pl. 5.

(m) *Hob.* 17.

(n) *Plowd.* 12. *Litt.* 324.

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* [104]

some. The case of *Whelpdale v. Whelpdale*, 5 Co. 119. is not like this. 3 Cro. 584. doth come somewhat near to this; but here is no personal act of the parties, here is an agreement in law which seems joint in its nature; here it is not the same promise which he declared upon, for the law raises it against them all; the joint * charging them is the very foundation of the action: and therefore he concluded for the defendant.

DOLBIN Justice. The action lies against the owners and it ought to have been brought against them all. Here is no express contract; and then a promise which the law raises against them all: it ought accordingly to be brought against them all. But it is doubtful if it should not have been pleaded in abatement. I think they might have pleaded it in abatement: and therefore I think the plaintiff ought to have his judgment.

HOLT Chief Justice. The questions are if this action be well brought against some of the part owners? and if the part owners, the defendants, may take advantage of this upon evidence? Consider upon what account they are answerable. **FIRST**, The master is liable and may be sued alone. The mariners may have their account against the master; the master may sue for the freight: he is such a person as may be sued. The part owners are chargeable, because they take upon them the fitting of the ship and have the benefit of it; the part owners are answerable as employing and having the benefit of the voyage; they are not chargeable as by reason of their interest; for if some do not agree and the major part do, the others shall not have any advantage of the freight, so that it is their having employed the ship: but here they are partners in common carriage, and there is no difference between them; they have a joint-trust reposed in them. This action is grounded upon the trust and that doth imply a contract: then in all cases where the action is grounded on a contract, all that are privies to the contract shall take advantage of this omission on the general issue: one is not a carrier alone. The declaration is, that the defendants *super se suscepunt*; it is the undertaking of the master; and that is the undertaking of all. It is the same as if he had said *super se assumpserunt* in consideration of a promise to pay the hire that the goods should be safe carried. It may be so alledged; and so it was in the case of *Rogers v. Head*, Cro. Jac. 262. and then advantage may be had of it on the general issue. The very taking of the goods is a general consideration, though he be not a common carrier, as in the case of *Symonds v. Darknol, Palmer*, 523. and the declaration held good though not said to be a common carrier; and the acceptance of the goods makes him liable. All the misfeasance in this case is but for a breach of trust. A common carrier is as much bound to carry goods as an innkeeper is * to lodge a guest: here the employment is joint, it is like a joint-office; a breach of trust in one is so in all: here the finding of the jury varies from the employment in the declaration; the reward is joint to be paid to them all, and so the consideration is joint. *Gelley v. Clerke*, Cro. Jac. 189. It is the reward that raises the action because of the advantage. Now the reward being

* [105]

being the reason to charge them the manner of charging them must be the same. Suppose these defendants had alone brought an action for the hire, this plaintiff, then defendant, might have taken advantage of this on the general issue. The case of *Whelpdale v. Whelpdale*, 5 Co. 119. is good law, because it was his deed *modo et forma*. If the other had died it would have been his deed. The deed is his several act though the lien be joint: there is a great deal of difference between declaring upon a deed and upon another contract. How could this be pleaded in abatement, that there were other part owners? That would not do, for if I have part of a ship mortgaged to me, I am not answerable, but it is the employment doth charge me. Suppose they had said that they *simul cum* the other *super se suscepunt*, ABSQUE HOC that they did assume *modo et forma*; for you must have traversed so: now what would this have been, but the general issue, as in 7 Hen. 4. pl. 8. But in those times there was no general issue pleaded for any non-feazance or neglect, but they always pleaded specially, and traversed some particular point in the declaration, Cro. Eliz. 369. Moore 355. If no general issue could be pleaded, it were somewhat: that case of 7 Hen. 4. pl. 8. was upon a real charge, this is upon a personal contract. I cannot distinguish the case of *Cole v. Wilkes*, Hutt. 122. from this; it appeared there was another joint occupier, and advantage taken of it on the general issue, because the duty arose there from the occupation: if the plaintiff will charge the owners, he must charge them in such manner as they are chargeable; he might have charged the master alone.

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And so PER CURIAM. Judgment for the defendant.



* The King against the Inhabitants of Hermitage in Dorsetshire. Cafe 105.

* [106]

WRIT OF ENQUIRY of damages for fences thrown down in the night. Held PER CURIAM. That there was no need of notice of the execution of the writ, because traversable.

On a *noftanter*, notice of execution of writ of enquiry is not necessary. —

S. C. Carth. 114. 239.

But PER CURIAM quashed, because "*Interessatus fuit pro residuo cujusdam termini*," where it ought to have been "*possessionat. fuit*." It might have been a concurrent lease, or a lease not commenced, and no possession laid: it was ill.

How title to a term must be stated.
Co. Lit. 17. 42.
Plowd. 191.
Pleader (C 35.)

5 Com. Dig.

In debate of this, it was agreed PER CURIAM that a grantee of common might have this writ; owner of the waste may have it; grantee of the herbage might have it. *Vide Kelway*.

The owner of a waste, and the grantee of a common, may have a *noftanter*.

Cro. Car. 280. Lutw. 741. See 29 Geo. 2. c. 36. and 31 Geo. 2. c. 41.

The

Case 106.

The King *against* Berchet and others.

An information for a riot in breaking fences and inclosures in Hertfordshire lies in THE CROWN OFFICE.

S C. 5 Mod. 459.
S. C. Ante, 49.
Finch. 336.
1 Sid. 387. 431.
Skin. 81. 108.
Cro. Car. 557.
579.
March. 52.
1 Lev. 257.
Carth. 384.
Ray. 417. 473.
201.
3 Mod. 317.
5 Mod. 221.
342. 459.
7 Mod. 40. 100.
Salk. 78.
Saund. 300.
1 Bl. Rep. 386.
2 Hawk. P. C. 369.
2 Hale P. C. 151.
4 Burr. 2556.
3 Bac. Abr. 165.
4 Term Rep. 285.
5 Mod. 459.

* [107]

INFORMATION for a riot in breaking the fences and inclosures of *Mr. Guys at Tring in Hertfordshire.*

SIR FRANCIS WINNINGTON argued last term for the defendant, that no information doth lie in THE CROWN OFFICE; and ordered to be argued again this term; for which I was prepared to argue it; but none being ready to justify their demurrer we had judgment *pro rege* PER TOUT LE COURT, *que gijl.*

My intended argument was as followeth: The question is, if this information doth lie; if the defendant be bound to answer to it? That it does, I shall prove by these following steps. FIRST, by shewing that an inquest is not necessary in all cases to enforce a defendant to answer the king's suit, and the reason why, and apply that reason to this case; and then shew that even in some capital cases it is not requisite, and that in all cases not capital there is no necessity of it; and so evince that this method of prosecution is no ways contrariant to any fundamental rule of law, but agreeable to it: and then shew the constant usage of this method and the approbation it both had from the judges and lawyers of all ages and in all reigns, even before *octavo Caroli*, as well as since; even before and after *Empton's Law* as well as under it, and that that law doth no ways affect this case; and then answer that, and the other objections started on the other side. The * rule which I agree to and lay down as my foundation is this, that no man is to answer the king's suit without some record importing his charge; but that if there be any matter of record or suggestion, or surmise upon record, or information filed as of record for the king, importing the charge of an offence; that this may, if the king pleaseth, serve instead of an inquest or verdict either by indictment or presentment, and that the party thereupon shall be compelled to plead to it as a presentment. I do not mean this of treason or felony, though there are two cases even in that too: nor do I mean to prove it by new offences created by statute or informations enacted to be for them; but offences at common law, or such as are made *de novo*, and no particular mode of prosecution appointed. The king's suits are of three natures. Either

FIRST, In matters of mere right and property, where freehold or inheritance is concerned. It is true, there must be an inquisition or office to entitle the king to either suit or service, and so is *Kehway*, 201. *Dyer*, 74; but in other cases a suggestion or information filed of record for the king will serve instead of them where an office is no otherwise requisite; which is the same as an inquest in our case: I will not cite particular* cases; the books are full of them; as *Bro. tit. "Surmise,"* pl. 5. 9. 30. 32. that a suggestion or information (which he uses promiscuously, and therefore with him as synonymous terms) of a dying seised under a term in chivalry, or a devise

devise by will of goods to the king, that in those cases such information upon record will serve instead of an inquisition. I urge this only to shew that in matters of great concernment, as inheritance, two juries are necessary to give the king an unavoidable right, as in case of crimes, where life is concerned, by grand and petit jury; otherwise in lesser matters.

SECONDLY, In matters that are part *crime* and part *interest*, it must be agreed that an inquest is not necessary to intitle the king to a suit, or to compel the criminal to answer; and for that there is a notable case in 35 Hen. 6. fol. 7. an information for unlawful taking and detaining certain jewels of the crown, which was a rank trespass, and a plea was to it of the city custom, for that shops being markets overt, &c. Upon arguing the demurrer, it was urged that this matter ought to have been prosecuted by way of presentment, which would be matter of substance to enforce the party to answer, and not by bare information, the which was denied by the attorney general, and it was accordingly judged * *pro rege*. The reason why I urge this, is because their arguments tend to overthrow all informations, as I shall shew presently. It must be further agreed, even that an information lies for intrusion into the king's land, and usurpation of his royal franchises, and yet these are crimes, and are *vi et armis*, and incur fine and imprisonment. Exporting goods out of England not paying the custom due by common law is an offence at the common law, as is *Dyer*, 43. These are suable here, or in the *Exchequer*, and punished by fine upon information: and it will be difficult to assign a difference between these and other offences; for they are against the crown, and all tend (though not in *equali gradu*) to the diminution of the king's honour and revenue, and he hath as much right to a fine after an offence committed, as he hath to a custom duty (which he hath by the common law, *Dyer*, 43.) and by them he is supposed in the eye of the law to support and maintain his courts of justice, as by the other to keep the seas open and safe for trade: nor can I see any reason why an indictment should not be as necessary in these cases as in ours. But to come closer:

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THIRDLY. In matters directly and simply criminal, a presentment is not requisite. That there must be a record, I will agree to be necessary, and so is the law declared in 42 Ed. 3. cap. 3. that no man shall be put to answer without presentment before justices, or matter of record, or due process of law according to the old law of the land; a record was necessary, because prosecutions were used by the attorney *ore tenus*, both before the king in his privy council, and before the king's council in *camera stellata*. Now this very act they have been pleased to urge as on their side, but how properly your lordship must judge, for it is so far from maintaining their assertion, that none are compellable to answer but upon indictment and presentment, which are all one (only the former is drawn by a clerk, the other is made by themselves informal) that this law doth plainly declare that there is some other legal way to charge a man with a crime, besides those two, for what else mean those words, "or matter of record or due process of law?" and it is in the disjunctive. Now it is a known

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4 Bac. Abr. 645.

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Male's Sum. 199.

3 Com. Dig.
499.

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known rule in the interpretation of statutes, that such a sense is to be made upon the whole, as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction, they may all be made useful and pertinent. If their construction be right that nothing but presentment is meant, then all the * rest is nonsense because it hath no meaning. But, my lord, none of these old laws are so weakly penned; they have a meaning and a strong one too; there is a due process to charge a man with a crime besides that of indictment; there is a thing of record besides that of presentment, and that is an information; which I shall presently prove agreeable to the old law. This act makes it plain to me, either there is somewhat else or not: if not, this statute is mistaken: If there be, it is an information or somewhat else; but there is no other, *ergo*, &c. It cannot be appeals; for that is the party's, not the king's suit. Therefore this act is so far from prohibiting the case of informations, that it strongly implies and establishes them. That a record is equivalent to an indictment or inquest, there are two instances. One in case of capital crimes, where a record importing the charge thereof is sufficient to compel the party to answer to it. As if an inquest be against A. and he confesses it, and by bill approve B. as guilty, and afterwards waives his approver by confessing his bill to be false, the king may notwithstanding proceed to arraign and charge B. upon that bill as at his suit, and B. is and shall be compellable to answer to it, and so are the books, 3 Hen. 6. pl. 80. and agreed so in 47 Edw. 3. pl. 5. and many others. So in an appeal of murder if the appellant become nonsuit, the king may proceed to charge the appellee, and he must plead, and may be tried, condemned, and executed upon it, though no inquest against him; and so are all the books, 11 Hen. 4. pl. 41. 4 Hen. 6. pl. 15. 4 Edw. 4. pl. 10. the same in Yelv. 13. the case of *Crispe v. Virol*. This I urge to shew that an inquest by a jury is not always and indefinitely necessary; and that to charge a man upon record is not contrary to the fundamental rules of the law, as is pretended. But to come closer. In matters merely criminal, but not capital, the finding of a jury is not requisite, 39 Hen. 6. pl. 41. as abridged by *Brook*, tit. *Surmise*, pl. 3. there is this resolution; that where a suggestion is made to the Court, that a *rescous* was committed upon the sheriff, coroner, or the like, it was affirmed by NOTTINGHAM then Attorney General, and ARDERNE Chief Baron, and LAICON did not deny it, that the Court shall award process against the offender: and it is agreed clearly by the reporter (says *Brooke*) that upon a suggestion thereof they would award process. It is not upon the return of a *rescous*; for that was resolved ill on an exception taken to it. It is true, *Brook* makes a question, *si tantum in Scaccario vel in aliis curiis*; but if there, then surely here, to whose jurisdiction all such matters are most proper. The abridgment speaks it indefinitely on a suggestion. Besides, in all cases of contempts to a court no presentment is necessary, no not so much as to convict; for if done in *facie Curie*, a record may be made of it, and a punishment judicially inflicted, and that executed immediately, as was done in *Mr. Reading's case*. But to come home to the point before you. In cases of crimes

crimes of which the Court can take no notice but *ab extra*, an information is sufficient to found process; and hath always been thought so even in all cases: and for that I will go backwards even to the reign of Edward the Fourth, and further. I will not name the last reign, because perhaps they will cavil at the authority, though in this they only followed their predecessors. In the reign of Charles the Second were abundance: I remember two not printed, and those were by *Sir William Jones against Harrington* for words, (a) and against *Johnson* for nothing, (b) and argued by SIR FRANCIS WINNINGTON there *pro rege*. In Michaelmas Term, 21 Car. 2. there was an information here against *Parris* and others for cheating a young lady, (c) and unlawfully procuring a warrant of attorney to confess a judgment in a very great sum, and a verdict and judgment, and the parties fined and committed, after debate in arrest of judgment. In Trinity Term, 19 Car. 2. *Inter indilamenta NUM* 19. an information by *Sir Thomas Fanshawe*, as coroner and attorney against *Opie Dodge* and other Cornish men for unlawfully getting one of themselves sworn of a tale in order to give a verdict for a defendant in trespass; and SAUNDERS offered to move in arrest of judgment, but was bid by HALES to bring his writ of error, and there was judgment *quod capiantur ad faciend' finem cum domino rege*: it is reported with the information at large in *Saunders Reports*. (d) In Hilary Term, 15 and 16 Car. 2. Information against *Alderman Sterling* and others for conspiracy, to take away the Gallon Trade; and judgment on debate. (e) And no doubt in all these cases, but an information lay; and yet they were all controversial and adversary suits. In Trinity Term, 15 Car. 2. it was delivered as law by KEELING, and agreed PER CURIAM, that if any information be exhibited by the Attorney General, or the Master of the Crown Office, the Court may quash it upon motion, because it is *ex officio*. (f) In Easter Term, 15 Car. 2. one against the inhabitants of *Yaxton* in *Oxfordshire* for not repairing an highway, and much debate upon motion, and no question of this point. (g) Here is plainly the opinion of HALES, KEELING, * WYNHAM, &c. nor did my Lord CHIEF JUSTICE VAUGHAN much differ from them; for he affirms them to lie here as well as in THE STAR CHAMBER. In *Bushe's case* (h) speaking of jurors being fined, &c. he says, "no man can ever shew that jurymen have been punished upon informations either in law, or in THE STAR CHAMBER, for barely finding against evidence, except where imbracery or subornation were joined," which shews it is a supposition that information did lie for such offences, and yet they are such as are not within any particular statute that directs this method of suit. They were so common in Charles the Second's time, that they are got into our precedent books of pleading. In *Vidian's Entries*. (i)

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(a) *Harrington's case*, Hilary Term, 29 Car. 2. 1 Vent. 324.

(b) *Rex v. Johnson*, Easter Term, 30 Car. 2. 2 Show. 1.

(c) *Mich. Term*, 21 Car. 2. 1 Sid. 484.

(d) 1 Saund. 301.

(e) 1 Sid. 174.

(f) 1 Sid. 152.

(g) 1 Sid. 140.

(h) *Vaugh.* 152.

(i) *Vid. Ent.* 213.

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is one exhibited by *Sir Thomas Fanshawe v. Justinian Paggit Senior*, for neglects and abuses in his office of *custos brevium*, as for an offence at common law; and fol. 215. are two more of the like nature; one of which is against *Wilkinson* the six clerk for cheating *Sir John Marsh, Longvil, and Bluck*, of a deed of articles and cancelling it: all which shews the opinion of the lawyers in this point; for the last was at the instance of lawyers; and *Vidian* was well known to be a good clerk, and a curious observer of what past here. Then for the late times, in Easter Term 1658. in *superior' banco*, one for forgery against *Charles Dudley*, the titular duke of *Northumberland*, for forging the entry of a marriage between *Sir Robert Dudley* and *Frances Vavasor* lady of honour to queen Elizabeth, in the register book of *East Greenwich in Kent*, and a trial on it, and much debate in arrest of judgment, and the party fined two hundred pounds by GLYNN and NEWDIGATE, which was (says the book) more than he was worth. (k) In Hilary Term, 1650, *Banco superiori*, an information against *Mayne* and two justices of peace, for not enquiring of a riot according to the statute of 2 Hen. 5. c. 5. which was committed near their residence, and verdict and judgment after debate, *nisi causa pro custodibus, &c.* (l) and it is observable that the statute which commands the inquiry, and upon which the information was grounded, did not give an information, so that it is the same with an offence at the common law. In *Stiles Practical Register* which was printed 1657, and is a bundle of observations said to be taken from the mouth of *Mr. Sergeant Roll*, there he hath a whole chapter upon this head of *informations*, distinct from a long one of *indictments*, and twenty rules made in those times concerning them, which sufficiently shews the approbation of their use even in those days: I will name one *verbatim*: In Michaelmas Term 1649. B. S., "an information may be preferred in this court against the inhabitants of any town or village in England, for not repairing the highways which they are bound to repair." Then he gives this reason for it, "for this court may punish offences done against the weal public all the nation over;" and many other rules *et dicta judicum* are there observed, which shews the sense of the lawyers of that age, &c.

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In the reign of Charles the First, there are abundance of precedents and resolutions. In Easter Term, 14 Car. 1. One *Freeman* (m) was brought by *habeas corpus*, being committed for a riot and rescous of one taken by a messenger, and a day was given to file an information, or prefer an indictment against him, and then said that there were frequently such informations for such and other like misdemeanors. In Hilary Term, 15 Car. 1. in *Steven's case*, (n) an ill practice appearing in one *Spicer* an under-sheriff, the clerk of the crown was appointed to draw an information for the misdemeanor. In Mich. Term, 8 Car. 1. one against *Ward* and *Lynne*

(k) 1 Sid. 71.
(l) Stiles 245, 246.

(m) Cro. Car. 579.
(n) Cro. Car. 566.

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for stopping a common way, (o) and a special plea and demurrer to it; and after argument and much debate a rule for judgment. In Easter Term, 8 Car. 1. against the Mayor and Commonalty of London for permitting a riot and tumult, wherein *Dr. Lamb* was slain, and none of the offenders taken, (p) and held to lie. And the same term against *Sir James Wingfield* and others for a riot (q) and on the trial urged strongly by *NOY* that the default of one should bind the rest, but resolved to be as several as in an indictment. In Hilary Term, 6 Car. 1. two several informations against *Stroud* and *Hobart*, for their several escapes out of THE GATE-HOUSE, (r) but no doubt of this thing, though they had good counsel and much debate upon the trial. In Michaelmas Term, 2 Car. 2. motion was made for an attachment against an officer of the Marshes of Wales, for arresting a court-leet juror while upon duty, whereby the king's court was disturbed, (s) the Court denied the motion because not an officer or process of their's, but directed an information against him here in this court for that misdemeanor. In Michaelmas Term, 5 Car. 1. one in this court against *Elliot, Hollis, &c.* for a misdemeanor, (t) a plea to the jurisdiction and over-ruled, a cause much debated, and this point started, but by one of their counsel, viz. MR. CALTHROPE, and answered as slightly by the ATTORNEY, that there were many precedents. This judgment was impeached in parliament (u) but this never objected as I can find by any of the histories of that time, which is a strong argument that the parliament thought an information to lie, if the matter had been within their jurisdiction; and if * they had thought otherwise, we should unquestionably have heard of it; as *Rushworth* hath it in his Appendix, (x) it is plain by the very note that this point was never started or questioned: the grievance complained of was restraint of liberty of speech in parliament and breach of that privilege; the words are, that "the information for matters done in parliament, and the same appearing in the information, was a breach of "privilege." Nothing can be a stronger argument, that it was illegal and why? not because it was an information, but because the crime charged, if any, was committed in parliament; and upon the debates in parliament in 1667, when reversed, as appears by *Cro. Car.* 606, 607. this was the matter insisted on, and *Stroud's att* urged as the ground of the reversal. I beg your lordships pardon for urging one instance more in that reign, for informations by the attorney even in an higher court than this. In the second year of Charles the First there was one exhibited by way of articles, and subscribed by the then attorney in the House of Lords against the then *Earl of Bristol*, for diverse high crimes and misdemeanors both here and abroad; the same was received by the Lords as a charge, and entered in their Journal upon record, the party forced to plead to it, and he did so, and the same entered in like manner; both are to be seen at large in *Dr. Francklin's Annals* of James the First and

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(o) *Cro. Car.* 266, 267.

(p) *Cro. Car.* 252.

(q) *Cro. Car.* 251.

(r) *Cro. Car.* 209.

(s) *Litch.* 198.

(t) *Cro. Car.* 181.

(u) *Cro. Car.* 604.

(x) Appendix to the first volume of *Rushworth's Collections*, page 56.

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Charles the First, &c. (y) The same was done in 17 Car. 1. Information by attorney against the *Lord Kimbolton*, and the five members of the commons house. It is true my lord, this last was but a melancholy precedent because of its consequence, for it was noted a breach of privilege as it is in *Nelson's Collection*; (z) but I do not find it noted illegal because it was not by presentment or impeachment; but the reason of their censure was, because the attorney had broke their privilege in meddling with members, and such against whom (they said) he had no proof to make good his charge. I urge this only to shew that in all these debates we no where find an information censured as illegal, *quà et quia talis*; and if an inquest had been thought universally requisite and necessary, it would certainly have been touched upon these occasions. In the next preceding reign, viz. James the First, our books do not take so much as notice of informations in this court; for *HOBERT* and *COKE* who were then attorney generals preferred most of theirs in *THE STAR-CHAMBER*; which I shall prove presently to be a strong authority for us, as even by the common law of England: yet even in this reign there * are many informations upon the file which I shall not trouble your lordship with, because ancient ones will be of more authority. In Michaelmas Term, 17 Jac. 1. B. R. Information that where, by the custom of the realm, to avoid annoyance of the highways, a public carrier should not carry in any waggon above two wheels, and above two thousand weight, that he had carried with eight horses, four wheels, and above that rate of weight from *Oxford* to *London*, by the which the highways were become unpassable; (a) and the party fined and imprisoned. In Michaelmas Term, 9 Jac. 1. here was a trial at bar on an information on 2 Hen. 6. c. 15. against fastening nets or trunks cross over any great river, &c. and much debate on the trial, and yet this act gave no information. (b) By 21 Jac. 1. c. 4. notice is taken of informations by the parliament as usually preferred by the king's sworn officers; that statute prescribes the manner how informations shall be by *THE ATTORNEY* for the time being, and by other officer or officers for the time being; this is a full authority for their allowance. In Easter Term, 25 Eliz. amongst the bundle of indictments of that term, are several informations by the clerk of the crown; they are in disorder and no numbers or figures to make search by, &c.; I read some myself; one in the name of *Miles Sands* coroner, and attorney of the queen, for a riotous assault and rescue against *Richard Bynsdale*; a *li. 10* marked upon it: the parliament in her reign allows them by 31 Eliz. c. 5. "that penal prosecutions shall be within a year, &c." there is an express proviso that it shall not extend to any officers of record, as "have in respect of their offices lawfully used to exhibit informations;" now here is the judgment of parliament that there were officers to exhibit them, and those that are meant must be *THE ATTORNEY* and his deputy, *THE CORONER*; for I know no other: and were it otherwise, that long proviso had been needless. But to go

(y) Pages, 123, 124, &c.
(z) Vol. 343, 344, 370.

(a) Edgerlin's case, Jenk. Cent. 7. Ca.
15. page 284.
(b) It is reported 12 Co.

higher,

higher: In Easter Term, in the first of *Philip and Mary*, NUM. 46. *Int. Indictment*, an information against *Plowden* and others for departing from the parliament without licence, &c. was exhibited by GRIFFIN the then attorney, with a *dat curiæ hic intelligi et informari* as now is usual; and six of them submitted to fines: and *Plowden* pleads with an idle traverse like that of a lawyer in his own case, but no scruple if an information lay: nor does COKE make any question of that, (c) but only about the court's jurisdiction of the matter, because parliamentary: It is reported, 4 *Inst.* 17, 18. In Michaelmas * Term, the sixth of Edward the sixth, was an information by the then attorney, *pur le Roy solement* against *Michael Harcourt* on the statute of maintenance. (d) I know they will say the statute of 32 Hen. 8. c. 9. gives an information, but *non constat*, this information was upon that law. Besides, with submission, I think the objection founded on a plain mistake, for none of those laws do give an information to THE KING: the common words are, "such a part to the king, and such a part to him that shall sue for the same in any court of record, by bill, plaint, information, action of debt, &c. in which no essoin, wager of law, or protection shall be allowed:" now it is plain this only gives it to the party; for *wager of law* never lay to the king's suit. Now if the king please he may sue for the whole penalty as well as pardon the whole; and therefore informations can no more be said to be given to the king by those laws than an indictment is, which is not named: now they must agree that informations have been frequent for the king for the whole penalty on those statute offences, and therefore they are of as strong authority as those of common law offences. But I will mention no more of these because of this exception. I must confess, I know of no statute that gives an information to the king but *Empson's law*, which I shall shew presently not to concern this case. In this reign of Henry the eighth there are abundance, and the reason why there were so few after it, was as *Sir Thomas Smith* saith in his "Common-wealth of England," the Star-Chamber was not so much frequented till after this reign, and the good effect it had in prosecuting and humbling this great cardinal. In Trinity Term, 23 Hen. 8. Roll 10. Information by SIR CHRISTOPHER HALES then attorney general, against several, for a nuisance in an highway in the county of Oxford *contra pacem et in malum exemplum*, and imparlances and other formal entries made as now, *hoc vide*, Trinity Term, 23 Hen. 8. Roll 12. The like by the same attorney general, in the same form against the mayor and bailiffs of Oxford, for stopping a ditch and filling it with filth, *ad nocumentum*, and imparlance: *hoc etiam legi*, Trinity Term, 23 Hen. 8. Roll 12. (*inter indict^o et placita coronæ.*) The like by the same attorney against Dr. *Ligham* a chancellor, for maintaining the authority of Rome on a statute of *præmunire*; on *non cul^o*, a jury ready to give their verdict at the bar, he expressly *subebatur quod non potuit dedicere information^o*: *hoc etiam legi ibid.*

(c) 4 *Inst.* 17, 18.

(d) Cited in the "case of discontinu-

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ance of process, &c." 7 Co. Rep. 30. b. and there is the same point, Dyer, 53.

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In Roll 16. against *Dr. Robert Cliff*, on the statute of 16 Rich. 2. c. 5. and after a trial a judgment of *præmunire* entered for seizure of * lands, goods, &c. In the same Term, Roll 17. there is the like against *John Baker*. The same Term, Roll 18. against *Thomas Pelles*. In Roll 19. the same against *Adam Traverse*. In Roll 22. the same against *Rowland Phillips*: all these I saw and read in THE TREASURY at Westminster. In Trinity Term, 35 Hen. 8. Roll 32. information against *Tho. Martyn un' clericorum et officiar' hujus curiæ* for a cheat in Warwickshire, and a fine on him. In Mich. Term, 25 Hen. 8. Roll 32. information against *RICHARD Bishop of Norwich*, and judgment of *præmunire* against him thereon. Now it is observable that these informations do recite the statute 16 Rich. 2. c. 5. and by that the party is to be attached to answer before the king and his council (which was there the court of Star-Chamber) or by writ of *præmunire*, which (says *Crompton Jur' 69.*) was to be sued out of Chancery, and they might be impleaded in the King's Bench by bill as in the custody of the marshal and by information in THE CROWN OFFICE, as appears by these precedents, and by both it appears there was no need of indictment, though the offence was merely criminal. In Michaelmas Term, 16 Hen. 8. Roll 15. information against the dean and chapter of Wells, *pro erectione cujusdam molendini aquatici ad nocument'* and laid in Somerset, and a *cognovit nocument'* entered. In Trinity Term, 13 Hen. 8. Roll 12 against *Thomas Wile* and others for not repairing of *Grove Lane* in *Oxford*. In Trinity, 13 Hen. 8. Roll 11. the like against *Katharinam* prioress of *Littlemore* for not repairing a way called *Stonesford Lane*. In Michaelmas Term, 12 Hen. 8. Roll 42. the like *PER ATTORN' REGIS* against *Will. Gregory* of *Sydingborn* in *Kent*, *pro non observat vigiliis' in nocte et aliis vigiliis*. In Trinity Term, 12 Hen. 8. Roll 42. *Devon*. the like against *Tho. Fule*, and others, *pro maletractatione WILL' WOLFE super deliberat' brevis regii eidem THOM' et aliis direct' pro restitutione bonorum WILL' SHELTON*. These were all offences at the common law. In Michaelmas Term, 12 Hen. 8. Roll 21. the like *PER ATTORN' REGIS* against *JOHN WILLIAMS pro obfupatione regia via* in *Tutton* in *Southampton*. In Trinity Term, 8 Hen. 8. Roll 43. *Worcester*. the like against *Sir John Savage* sheriff there, for a trespass, contempt, and misbehaviour in his office. In Easter Term, 12 Hen. 8. Roll 4. *Oxon'*, the like *per attorn' regis* against *John Traverse*, and others, *pro non reparatione regia viae nuncupat' le Caussey ducent' a parte vocat' OSNEY BRIDGE usque passagium vocat HINCKSEY FERRY*. In Trinity Term, 23 Hen. 8. Roll 32. information by *Sir C. Hales* against *Robert Cliff*, and others, *quare clausum apud villam Westmonaster' fregerunt et alia enormia*. In Easter Term, 23 Hen. 8. Roll 32. against the mayor and bailiffs of *Oxford pro nocument'*. In Michaelmas Term, 20 Hen. 8. Roll 22. information by *Will Fenner* coroner against *Abraham Price pro insultu super quendam &c.* All the last there are docquets of them on their Roll in THE * CROWN OFFICE kept for that purpose, though the informations are not there but removed. In this reign of Henry the seventh there are several precedents

dents of informations in the Crown Office. In Michaelmas Term, 20 Hen. 7. Roll 6. one for a trespass and contempt against *Henry Gerves* clerk, and in Easter Term, 23 Hen. 7. was an information by the then attorney general, *James Hobard* against *Milles* and others for a cheat in levying of a fine in another man's name, in *contemptum regis ad malum exemplum*, and in form as is now: it is printed as a precedent in *Moyl's Entries* 22. under the title "COMMITMENT;" But because *Empson's law* may be thought to affect this time (though in truth it doth not, as I shall shew presently) I will therefore go beyond it. In Trinity Term, 9 Hen. 7. Roll 26. Information against *Robert Brandon* and others *pro transgressione et contemptu*. In Hilary Term, 9 Hen. 7. Roll 13. *Confinable* in Michaelmas Term, 9 Hen. 7. Roll. information against *Peter Edgescombe*, and others to the number of sixty-nine *pro transgres' et rioti', et omnes fecerunt finem cum rege*: these were all common law offences, and there are docquets of them in the Crown Office to this very day. In Trinity Term, 18 Hen. 7. there is, among the bundle of indictments of that term, an information by *James Hobart* against *John Sygrave*, for presenting one *Richards* in court christian, for calling the defendant "thief," to the prejudice of the king's courts; this record I have seen and read at Westminster in the upper treasury over the parliament house. In Easter Term, 22 Hen. 6. Roll 32. information against *Tho. Piccard* for a trespass. In the same Term, Roll 34. the like against *John Gaston* for deceit. In Trinity Term, 22 Hen. 6. Roll 40. the like against *Richard Dodd pro transgr'*. In Michaelmas Term, 22 Hen. 6. Roll 15. the like against *Martin Blake pro transgr'*. In Hilary Term 23. Roll 15. *pro manutentione*; and this was before the statute which gave information to the party that would sue for the penalty. In Easter Term, 34 Hen. 6. Roll 25. an information *pro manutentione* against *John Gawtree*. In the same term, Roll 34. are seven several informations. Besides, I found upon search of the Rolls *inter placita coronæ*, in Trinity Term, 22 Hen. 6. Roll 20. several entries where the informations are not entered, a process awarded on the suggestion of *THO' GRESWOLD qui sequitur pro domino rege, &c. de placito transgr'*, and an attachment. And Roll 25. throughout the whole roll, abundance of such entries. *THO' GRESWOLD qui "pro domino rege sequitur versus ROBERT' ARNOLD, et al' de placito "transgr' et contemptu' contra formam statuti de venatoribus,"* and upon that there is an award of process; *hoc vidi*, and in all others it is entered *indictatus, &c.* In Easter * Term, in the fifth year of Edward the fourth, Roll 4. *WALTERUS TRAVET impetitus pro intratione liberæ chase domini regis et fugatione damarum*. In Michaelmas Term, 5 Edw. 4. Roll 4. *DAVID JOHN, impetitus pro insultu et verberatione JOHANNIS GREEN*. Ibid. Roll 21, *LUDOVICUS JOHN, impetitus pro fractione clausi domini regis*. Ibid. Roll 22. *THOMAS MAY, et al' impetiti' pro insultu et verberatione ROBERT' HOWSTER*. Ibid. Roll 25. *ROGERUS WYCHE, et al' impetiti' pro insultu et verberatione WILL' SPICER*. In Michaelmas Term, 12 Edw. 4. Roll 18. *ROBERT' RUSSEL, impetiti' pro insultu et verberatione*. In Hilary Term 12 Edw. 4. Roll 39. *JACOBUS REEVE, et al' impetiti'* for forestalling. In Hilary Term, Roll 41.

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See a catalogue
of these MSS.
in Mr. Serjeant
Runnington's
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ments.

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JOHANNES WEST *impetit' supra stat' de manutentionibus*. Of these there are memorandums in THE CROWN OFFICE. In this reign upon the Rolls I find in Hilary Term, 12 Edw. 4. Roll 17. JOHANNES WEST, *qui pro rege sequitur versus JOHANNEM LYSONS et JOHANNEM REEVE*, for forestalling *de placito transgr' et contempt' et non venit*, and an attachment awarded. In Michaelmas Term 5 Edw. 4. Roll 22. I find *John Doyle* outlawed for maintenance, *unde impetitus, &c.* In Trinity Term in the first year of Richard the second, Roll 17. information by *Tbo' Sbardlow* coroner *et attornatus regis* against *Johannem Wotton pro insultu*. In Easter Term in the third of Edward the third, *coram rege* Roll 9. *indors. Southampton*; the bishop of Winchester was attached *ad respondend' domino regi de eo quod cum inhibitus fuit discedere absque licentia*, he departed from parliament, &c. and *Adam de Fincham* the then attorney *qui pro domino rege sequitur* prays process, and the bishop pleads to the jurisdiction of the court *et idem qui pro, &c.* demurs. I urge this to shew that indictment or presentment was not always necessary even in those days. The record is recited at large, 4 *Inst.* 15. It is true, my LORD COKE says, this was by original writ, but it was not upon an inquest. Amongst the LORD HALE's manuscripts in Lincoln's Inn library, there is a book figured LIBER I. the title is, "*Placita a primo Edwardi primi usque 18.*" It seems to be an alphabetical table to the records of those eighteen years, and there I find under title "INFORMATION" (which is a distinct head from that of "INDICTMENT") these following notes. "Information,"—"Trinity Term, 10 Edw. 3. Rot. 15. Information for a nuisance."—"Pasch. 13 Edw. 3. Rot. 106. Information against the justices of Ireland, *committitur* into Ireland."—"Trinity Term, 18 Edw. 3. Roll 27. Contempt and slanderous words punished by information."—"Trinity Term, 21 Edw. 1. for breaking the assize of bread."—"Trinity Term, 13 Edw. 1. *majus*, nuisance for stopping a common river punished by information, and the jurisdiction of the court well vouched."—"Trinity Term, 18 Edw. 1. *Mich.* 18 & 19. Edw. 1. *majus*." All these I find there in distinct lines. I confess I have not searched for the records themselves for want of time. Besides all this, there is the continual usage of THE STAR CHAMBER, which, as appears by the 16 Car. 1. c. 10. which abolishes that court, had no redress or remedy to punish offenders, but what might properly be had in other courts, meaning this, which in truth is the supreme for pleas of the crown, all being here *CORAM REGE sans addition*, therefore the parties there declare the law of the land not to be as they would have it, *viz.* universally to require a presentment. There were always informations for riots, assaults, menaces, libels, slanders, false news, forgeries, perjuries, extortions, and other misfeasances, &c. which in the reigns of queen Elizabeth, and king James the first were very common: I will not cite particulars; it would be endless; the reports are full of them. But I will go higher, because of the statute which they say erected that court. If we may believe the LORD COKE, he says, (c)

(c) 4 *Inst.* 62.

that

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that the 3 Hen. 7. c. 1. did not erect that court, but confirm and establish it; adding the two chief justices as judges, and empowering them to examine the defendant upon interrogatories. He quotes many authorities of offences punished there; but because *Mr. Pryn* in his epilogue to and on the fourth institute cavils at three of them I will not name them, but others, which will sufficiently declare the antiquity of the use of informations. (f) One *Bigot* was fined forty marks for a riot, and in THE YEAR BOOKS are several cases *coram rege* in *camera stellata*, as 22 Aff. Pl. 22. and Register 124. is a writ to appear *coram rege et concilio suo*; and in 24 Edw. 3. 33. Information before the king's council for going armed within his palace. (g) In *Cotton's Abridgment* (h) *Cavendish* was fined one thousand marks for a slander on the then chancellor, (i) and there are abundance, which I will not mention, in *Rushworth's collection* (k) and the *fourth Institute* (l); and in truth so many, that it was the terror of the people, and upon that occasion were the complaints by the commons, because they were convicted without a jury, not because it was by information. Some will have the Star-Chamber no court of record, because their proceedings are in English. But if that were an objection, then all the ancient parliament rolls and acts of parliament before Henry the sixth which are most inrolled in *French*, not in *Latin*, and many charters, * writs, and commissions enrolled in French; and the statutes since the first of Henry the sixth, must be no records.

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It is high time now to answer their objections. But here my lords I would first observe the reason and use of a presentment or indictment, it is to apprise the king of such an offence committed, as it is of an office, to inform him of a title in civil matters. The jury only presenting, they do not accuse or pray process, so that it is plainly for the sake of the king as well as the subject, or rather more upon his account that there should be such inquiries; but if the king's court be otherwise informed by a record it is sufficient for him, but say they,

FIRST OBJECTION, It is inconvenient for the subject, and many needless informations may be exhibited without cause, to the vexation of the subject, and no remedy against the officer.—ANSWER, Here is no inconvenience to the people, Here is a trial *per pais*, fair notice, liberty of pleading *dilatories* as well as *bars*. Here is *subpœna* and *attachment*, as much time for defence, charge, &c. for the prosecutor makes up the record, &c. then, in case of malicious prosecution, the person who prosecutes is known by the note to the coroner, according to the practice of the court. It is true, no action lies against the attorney or coroner; no more does it against a grand juror or prosecutor; as was ruled in the *Lord Macclesfield's case* in the Exchequer, and long before that in the case of *Agard v.*

(f) 28 N. 2 Hen. 7.

(g) Bro. Abr. title "Contempt," pl. 6.

(h) Page 300.

(i) 7 Roll 2.

(k) 2 Vol. page 475.

(l) Page 62.

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Wild (m) and the reason given for it is because they are upon their oaths, and so they are here as officers upon record.

SECOND OBJECTION. *Magna charta, cap. 29.* That "*nullus liber homo capiatur vel imprisonetur, &c. nisi per legale iudicium parium suorum vel per legem terræ.*"—ANSWER, That this method of prosecution no way contradicts that law, for we say this is *per legem terræ et per communem legem terræ*; for otherwise there never had been so universal a practice of it in all ages. Besides, *per iudicium parium* in that law is intended only of trials *per pares*, not of an accusation; and it hath always been construed so, and used as an argument for it, and such a trial the defendants might have had in this case if they had so pleased; and no man is to be punished upon an information, but after such a *iudicium parium suorum*, unless he confess the fact, either expressly by a *cognovit*, or implied by default of pleading his cause on such a trial.

* [121]

* THIRD OBJECTION. That *Glanville* and *Fleta* say that crimes are to be prosecuted by presentment.—ANSWER. I may with submission to your lordship deny their authority, and for doing so the books would warrant me, as in *Fitz. Grand Abr. tit. "Gard."* 71. it is held by all the court, that *Bracton*, *Glanvil*, and *Fleta* were never taken for authors in our law; and in *Stowell's case*. (n) SAUNDERS Chief Baron, when he quotes *Bracton* and *Glanvil*, says, he cited them not for authority, for they were not authors in our law, but he used them only as ornament to his discourse; and CATLYN says the same thing, (o) when he quotes them. But however to give them a more particular answer. *Glanvil. cap. 1.* was cited the last term, but I suppose it was only to make a good sound with *Fleta*, for I can find nothing in him about it: and SIR FRANCIS WINNINGTON must have good eyes to read one word to the purpose in all the book, for the first chapter is nothing but *placita civilia et criminalia* divided and distinguished, and *Lib. a. cap. 15, 16, 17, 18.* is nothing but a discourse of an assize and the jury to try it; nothing to this effect. As to *Fleta, lib. 2. cap. 52. fol. 112, 113.* it is a discourse of the king's court in the sheriff's turn *et alibi*; all that he says is of the articles of enquiry. Then *sect. 39. de vic. et ballivis in turnis et visibus de franco pleg' de malefactoribus inquirentibus, statut' est*, that if they take and imprison any man in any other manner than they were indicted by twelve jurors who set their seals to such indictments, trespass shall lie for a false imprisonment. Now to ANSWER this. FIRST, It is plainly no law, nor the author a lawyer; for by our law there is no need of a seal to any indictment, but only to an inquisition of office. SECONDLY, If there were need it relates only to sheriff's turns, and those inferior courts and not to the King's Bench. THIRDLY, If it were law, it must certainly extend to all the particulars there mentioned, as articles of inquiry, and consequently no information would lie for intrusions, or deceiving

(m) Bridg. Rep. 139.

(n) Plowd. 357.

(o) Plowd. 358.

the king of wrecks, or usurpation of royal franchises, without authority; for these are all particularized there.

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FOURTH OBJECTION. In 7 *Edw. 3. pl. 26.* that the king brings a writ against the sheriff upon the statute against making of undue returns of jurors, and it was there held that the king was not to be answered unless he were apprized by indictment or presentment, &c. — ANSWER. * The reason there was because there was process used; there was a writ awarded for a *tort*, a wrong to the crown before the king's court was apprized; that there was such offence committed by some matter of record. The words of HILL are "Sir, we apprehend that the king will not be answered to this writ, before that he be apprized of it *per inditement vel autre manner*," whereupon he prayed judgment of the writ; the mistake was, the writ issued before any judgment found or any information filed, and the words "*ou autre manner*" implies it. In all the cases "*sans estre apprize*" is with an, &c. wheresoever it is named. Now in our case, here is the court apprized, here is "*dedit curiæ hic intelligi et informari*" before any process; this is done by a sworn officer filed of record. Besides in *Kekway 19.* it was held otherwise; and in 5 *Edw. 3. pl. 33.* the same exception is overruled in case of a writ of champarty, and the party ruled to answer, and did so.

* [122]

FIFTH OBJECTION. 26 *Edw. 3. fol. 20.* a writ of rescous for the king held naught for the same reason as in the other case aforementioned.—I give it the same answer, because the writ issued before the king was apprized by any information, &c.

SIXTH OBJECTION. That COKE in his comment upon *Magna Charta (p)* says, "no man shall be taken," *i. e.* restrained of liberty by petition, or suggestion to the king or his council, unless it be by indictment or presentment.—ANSWER. By petition or suggestion can never be meant of the King's Bench, for he himself had preferred several here; that is meant only of the king alone, or in council, or in the star-chamber. In the King's Bench the information is not a suggestion to the king but to the court upon record. Besides, his text warrants no such comment, for page 49. where he explains *per legale iudicium parium suorum*, he says it extends only to the king's suits for treason, or felony, or misprision, for in lesser, or other offences a nobleman may be cited by other than his peers, *viz.* by commons; all which doth shew that the law doth not require a presentment by a jury of peers, for if it did it must extend to peers as well as others; and then I am sure it was never observed since it was made: besides, "*per legem terræ*" includes any due process of law.

* SEVENTH OBJECTION. That informations were brought by *Emysen and Dudley*; that 11 Hen. 7. c. 3. was the first that introduced them into our law.—I answer first, informations were given

* [123]

(p) 2 Inst. 46.

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to the party informer in many cases before by particular statutes, as by the statute of liveries in the time of Edward the fourth, and several in Henry the sixth's time. Secondly, That of informations for common law offences, I have shewn your lordship many precedents of before this time. Thirdly, I have shewn you several just after it was repealed, which was 1 Hen. 8. c. 6. Besides, Fourthly, This law never introduced them into the King's Bench at all, nor did it any ways concern this court, for it is only thus; "that justices of assize, and justices of peace shall have power upon information before them made for the king, to hear and determine at their discretion." Now what was this to the King's Bench? Besides there was an express proviso, "that the said informations should not, reach any person dwelling in any other shire than there where such information was given," so that it not only gives no power to the King's Bench, but expressly excludes them: now how this could introduce informations into this court I know not. Besides, the prosecution by informations was not the thing complained of by that law, but the determining by discretion, and not *secundum legem et consuetudinem Angliæ*; and my LORD COKE complains there was no trial by a jury. *Empson and Dudley's* crimes were the inflicting penalties which the particular statutes never intended, and procuring false informations and undue offices, and refusing to admit traverses where by law they ought; this was their crime as appears by the indictment against them, 4 Inst. 198.

EIGHTH OBJECTION. That COKE (q) says, That the king cannot put any man to answer but by presentment or indictment.—I wonder truly why that was urged, for it plainly proves my position laid down at first: the words are, "The king cannot put any to answer, but his court must be apprized of the crime by indictment, presentment or other matter of record;" which is what I at first affirmed, and here it is an information filed of record.

NINTH OBJECTION. That the 5 Edw. 3. c. 9. says, "That no man shall be attached by any accusation, nor forejudged of life or limb, nor his lands or goods seized into the king's hands against the form of the great charter, and the law of the land." * [124] * We say this is not contrariant to THE GREAT CHARTER as is shewn afore, but is agreeable to the law of the land, and a practice founded upon it, and always approved by the professors of it till now.

TENTH OBJECTION. The statute of 25 Edw. 3. cap. 4. ANSWER, That is plainly meant against the proceedings before the king and his council, and not here in this court; and the same is no more than the requiring the due course of the law to be observed: which we say is here, and this is *secundum legem*, for that the precedents, customs, and common judicial proceedings of a court are the

law, and so is *Cro. Car.* 527, 528. the *Lord Mounson's case*, and 4 *Co.* 53, and abundance more.

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As to all the petitions and complaints in parliament against calling people to answer unjustly to their great vexation; they were occasioned by the exorbitant proceedings of the council, and not of this court, nor do any of them mention it, nor are they aimed at in it, as is apparent throughout all *Sir Robert Cotton's Abridgment*. (r)

In answer to *Cavendish's case*, which is 1 *Anderson* 156. and was urged not as pertinent to the point, but as hortatory to your lordship to follow the example of those judges, who notwithstanding the queen's letter did keep to the law; I think that might have been spared at this time of day, when there is no occasion for it; but in answer to SIR FRANCIS WINNINGTON who cited it, I will give him two for his one: the first is the 13 *Hen. 7. fol.* 23. that a counsellor ought not to be heard to speak against common precedents. And the other is the saying of SIR J. PRISOT who was a learned judge in Henry the sixth's time, it is 33 *Hen. 6. fol.* 41. "If we shall adjudge contrary to received precedents, it will be of
"evil example to the young apprentices and students of the law,
"inasmuch that they will not know what to give credence to, whe-
"ther old books, or new judgments."

Upon the whole matter after so long an usage, so much approbation from the judges and parliaments, so many publick directions in court for them, and no complaint of their illegality till now, and so plain a consistency as they have with every fundamental and other rule of law, for to destroy this without act of parliament, will be as much against MAGNA CHARTA, as the contrary is agreeable with it, which is as plain as the words of it: and therefore I pray judgment for the King.

* *Jenkyns* says, (s) that buying of debts was maintenance at the common law, and punishable by indictment or information. * [125]

JUDGMENT was given PER TOUT LE COURT *pro rege*; though WINNINGTON said, he thought the lords had determined no information to lie when they reversed *Sir Samuel Barnadiston's* judgment; but Mr. JUSTICE EYRES affirmed the contrary, and that it was for other errors and not that; though BARON LECHMERE argued there to that purpose, much to the same effect as WINNINGTON had, and that he told him that it was his opinion, and he had furnished SIR FRANCIS with the materials of that his argument.

Judgment for the King.

(r) See *Cotton's Abr.* 54, 55, 67, 106, 133, 178, 179, 295, 620.

(s) *Jenk. Centuries*, Cent. 3. Case 9. ch. 108.

Case 107.

Witherley against Sarsfield.

Michaelmas Term, 2 Jac. 2. B. R. Roll 645.

A bill of exchange drawn by a gentleman travelling beyond sea for education, is within the custom of merchants.

S. C. Holt. 112.

S. C. 2 Vent.

292.

S. C. Comb. 45.

152.

S. C. Carth. 82.

Post. 164.

2 Vent. 310.

3 Salk. 125.

Clift. 927.

1 Atk. 128.

2 Bl. Com.

476.

ERROR in the Exchequer Chamber upon a judgment in the King's Bench, where the plaintiff declared in case upon the custom of merchants, That if any merchant or other trading person make and direct any bill of exchange, directed to another, payable to any merchant, or any other trading person, and the same bill be tendered, and for want of acceptance be protested, that in such a case the drawer by the custom is chargeable to pay, &c. That the defendant at *Paris* did draw a bill on his father here in *London* payable to the plaintiff, that the same was presented, but refused, and he, according to the custom, *protestavit sive protestari causavit prædictæ billam*, &c. whereby he became chargeable; and in consideration of the premises did assume, &c.

The defendant pleads, that he was a gentleman, the son and heir of *Dr. Thomas Witherley*, and at the time of drawing the bill was a traveller, and at *Paris* for his better education, &c. And that he was neither then, nor any time from his birth hitherto a merchant or trader, or did ever deal as such, and that he was then at *Paris* as a gentleman and traveller as aforesaid, ABSQUE HOC that he is or ever was a merchant, or person trading by way of merchandise between *Paris* and *London*, *vel alibi ubicunque prout* the plaintiff supposes. *Et hoc paratus est verificare.*

The plaintiff demurs; and shews for cause, that the plea amounts to a general issue, is double, uncertain, and wants form.

*[126]

* Judgment for the defendant in the King's Bench, and the plaintiff brings a writ of error.

I ARGUED for the plaintiff, that this plea was ill, because it did amount to the general issue, and we had shewn it for cause. It answers no more than might be given in evidence. It answers the *assumpsit* only by way of argument. Besides, here is an *assumpsit* grounded upon consideration of all the premises which are a consideration executed, and consequently not traversable; otherwise where it is executory; and so is the *anonymous case*, *Cro. Eliz.* 250. and *Smith v. Hitchcock*, *Cro. Eliz.* 201. and *1 Leo.* 252. *indebitatus*. Plea that he gave bond for that money, ABSQUE HOC that he was indebted *aliter vel alio modo*, and held ill, because a traverse of the consideration which is not traversable, and amounts to the general issue; and though but matter of form, yet shewn for cause it is all one.—Besides, the matter of this plea is ill, for it is *repugnant* in itself; for he admits himself to have drawn the bill, and yet traverses that he never was a merchant, whereas the bare negotiating of a bill of exchange makes him a merchant for that purpose; the very act of taking up monies in a foreign country, and undertaking for the

the repayment here by bill of exchange is such an act of merchandize as you will take notice of. Monies now are become merchandize, and some men's business is wholly in its exchange. The rates and profits of exchange are now certainly known: a man may be a dealer or trader in one sort or kind, that is not so generally. Though he be not a trader so as to be capable of being a bankrupt, yet he may be a trader to oblige himself by his own act. The parliament in the last statute of bankrupts made a *quære* whether a man that had a stock in a company was a trader, and therefore by express provision did except them. (a) So that a little matter will make a man a trader. Besides, the inconveniency will be great both at home and abroad, and work a manifest wrong. If a bill be payable to him he has the advantage of it, though a gentleman, *pari ratione* he ought to be bound. If a traveller's bill drawn beyond sea shall not enforce a payment upon a protest, our English gentry must suffer in their credit, when by their laws they are answerable, though not as merchants, and by ours must not. The necessity and usefulness of transferring money easily by bills of exchange commands all the encouragement imaginable: and therefore I prayed a reversal.

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* HOIL *à contra*. By their own shewing he must be a merchant else not within the custom, and was to have traversed that, and they have confessed it by their demurrer.

* [127]

HOLT *Chief Justice*. It is not every plea that amounts to a general issue that is ill, and the custom is the foundation, and the plea is an answer to that, and therefore well enough. But this drawing a bill must surely make him a trader for that purpose, for we all have bills directed to us, or payable to us, which must be all avoidable, if the negotiating a bill will not oblige, &c.

Then HOIL took exceptions to the declaration as uncertain, because said "*protestavit sive protestari causavit*," which is uncertain. To which I answered, that the one was surplusage, and the other was good; if it had been "*caused to be protested*," this protest would have been good evidence of it. If it had been "*protested*," our causing it to be protested would have maintained it. Besides, this is all admitted by their plea; for they agree that it was protested, but say that they were not bound to pay it: And so we had judgment reversed.

A declaration on a bill of exchange stating *protestavit sive protestari causavit*, is sufficiently certain.

Comb. 153.
3 Bac. Abr. 613.

Afterwards I MOVED in the court of King's Bench for judgment for the plaintiff, and shewed them the case of *Claxton v. Swift*, (b) where was judgment for the defendant in *banco regis*, and that judgment reversed, and afterwards judgment in *banco regis* for the plaintiff upon the *remittitur*; and so was the case of *Faldae v. Ridge, Yelv.*

On judgment for the defendant being recovered in the Exchequer Chamber, judgment may be entered Cro. Car. 511.

in the court below and a writ of enquiry awarded.——Post. 400. Cro. Eliz. 806. 1 Salk. 262. 2 Saund. 256. 1 Ld. Ray. 6. Dougl. 350. 752.

(a) See 13 & 14 Car. 2. c. 24. and 9 2 Bl. Com. 476. Cooke's Bank. Laws, & 10. Will. 3. c. 44. 3 Geo. 1. c. 3. f. 80.
43. 6 Geo. 1. c. 18. 8 Geo. 1. c. 21. (b) 2 Show. 441. 494. Skin. 255. 3
3 Peer Wms. 308. 2 Ld. Ray. 851. Mod. 86. 1 Lutw. 878.

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76. Ent. Trin. 2 Jac. I. Rot. 267. (c) And accordingly we had rule for the plaintiff for judgment; whereby my client got his debt on a writ of enquiry from the bail; the defendant being gone for Ireland.

(c) Yelv. 74. Noy. 129. Cro. Jac. 206.

Case 108.

Carter against Downish.

Hilary Term, 3 & 4 Jac. 2. B. R. Roll 831.

To covenant on a deed whereby the defendant agrees to pay certain bills of exchange, a PLEA that the plaintiff, according to the custom of merchants, indorsed the bills to A. who indorsed them to B. and that he, the defendant, paid part of them to B. and tendered the remainder to the plaintiff, is good, although the custom is not specially stated, nor the tender pleaded with an *encore pres*; for the custom of merchants is part of the common law, and the courts will take notice of it without being specially pleaded; and *encore pres* is not necessary in covenant when damages and not debt is in demand.——S. C. 3 Mod. 226. S. C. Carth. 83.

• [128]

The judges ought to take notice of the law of merchants; being part of the common law.

Carth. 83.
Post. 318.
Lutw. 233. 892.
1585.
Hard. 486. 3 Mod. 226. 5 Mod. 367. 2 Roll Rep. 113. Yelv. 135. 4 Com. Dig. 246. Ld. Ray.
175. 281. 759. 10 Mod. 287. 3 Bac. Abr. 585. 3 Burr. 1663.

ERROR in the Exchequer Chamber of a judgment in the King's Bench, where the plaintiff declared in covenant of a deed, reciting that the plaintiff had covenanted to deliver one thousand kintals of Newfoundland fish, or so much as should be made in that season, the defendant covenanted that he the defendant would pay such bills of exchange as should be drawn on the plaintiff his executors administrators or assigns in the dwelling house of Robert Aylwin merchant in London, and alledges that there was a bill drawn payable to them at forty days sight; that the same was presented, accepted, and not paid, &c. The defendant pleaded, that within the forty days after the bill was shewn, the plaintiff by indorsement on the bill according to the custom of merchants appointed the payment to Mr. Herbert Aylwin or his order, and that he indorsed it to one Tassel; that the defendant within forty days did pay to Tassel one hundred pounds, part thereof, and afterwards tendered in the house of Aylwin, the three hundred pounds residue, which was refused. *Et hoc paratus est verificare, &c.* Demurrer, and joinder in demurrer. Judgment for the plaintiff in B. R. and the defendant brings a writ of error. General error assigned.

I ARGUED for the plaintiff here, that this plea was good. The exceptions taken to it were two. FIRST, Because we do not set forth a particular custom to warrant our indorsement. SECONDLY, Because we do not plead the tender with an *encore pres*.

TO THE FIRST we say, That the law and custom of merchants doth warrant the indorsement of foreign bills of exchange, and for that all the book cases on foreign bills of exchange are a proof; and it is as plain, that such an indorsement doth really transfer the property of the money, or contents in such bills to the indorsee, and that all this law of merchants is part of the law of the land; and your lordships are obliged to take notice of that, as well as of any other law. "The law of merchants is part of the laws of this

"realm,"

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"realm," are the very words of COKE. (a) It is not like a particular custom, which is confined within a certain precinct in the realm, but it is of universal extent, and concerns the whole realm; nay, reaches further, for it is *jus gentium*, and concerns all countries where traffick is used: you do take notice of that part of it, which distinguishes it from other interests in point of survivorship, that "*jus accrescendi inter mercatores pro beneficio commercii locum non habet*," and this is "*per legem mercatoriam*, which is *pro bono publica*" (b). Debts or duties as well as wares shall not survive, 38 Edw. 3. 7. the words are, "It is the law of merchants, &c." In the 2 Inst. 58. in the exposition of MAGNA CHARTA, cap. 30. *de antiquis et certis consuetud.* he calls them "ancient and lawful customs of the realm *per legem mercatoriam*, which is a part of the "common law," these are the very words of the book. In 2 Inst. 404. on the statute of Westminster the Second, cap. 23. "*habeant de cetero executores breve de computo, &c.*" COKE says, "by the common law executors should not have account before that statute; but *per legem mercatoriam* an action of account did lie for "executors;" and our books take notice of it,* and no need for setting forth a particular custom for this. In Fitzherbert (c), "if two merchants occupy their goods and merchandises in common, one of them shall have an account against the other, *sicut per legem mercatoriam*," so that you take notice of that, and so is THE REGISTER 135. If foreign merchandises be waived, if they belong to merchants, the law takes notice of them and exempts them from seizure, 13 Edw. 4. pl. 9. In the same place it is said, that the law of merchants is known throughout the realm, nay, the world. In *Holland's case*, 4 Co. 76. concerning general statutes, it is agreed, that acts of parliament concerning mysteries or trades are general acts. I urge it only for the reason sake, which is that though it only contains under its name particular persons, yet being of general influence and concern, the judges will take notice of it: In Fitzh. Abr. tit. "Account," 127. the writ was general as receiver, but the account was particular, and yet ruled to be well, being as merchants; whereas if the writ were formed on a particular custom, the writ ought to be so, as in a *rationabili parte bonorum* for common part, &c. But supposing it not good by, &c. yet it amounts to an appointment: the covenant is to pay bills to him, his assigns, or order; this indorsement shall make an assignee or servant. It shall amount to *designatio personæ* to receive, though not so as to transfer the property to sue for and recover, and then our payment of the hundred pounds will be as good payment to him, being made to his servant or order.

*[129]

(a) Co. Lit. 182.
(b) Co. Lit. 182. But see more fully
to this 2 Brownl. 99. See also Acc.
Noy. 55. 1 Vern. 217. See also as to

other instances of *lex mercatoria*. Cro.
Jac. 306. Cro. Car. 301. 1 Roll Abr.
6. 1 Sid. 179. 236.
(c) Natura Brevium, p. 117.

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In covenant tender and refusal need not be pleaded with an *encore pres.*

Salk. 584.

2 Roll Abr. 523.

Co. Lit. 207.

Cro. Eliz. 755.

1 Sid. 30.

Salk. 623.

Ld. Ray. 254.

2 Show. 143.

5 Bac. Abr. 16.

* [130]

As to THE SECOND, a tender and refusal amounts to a payment and performance: as in case of a bond for performance of an award without an *uncore prift*, Co. Lit. 207. *Peitoe's case*, 9 Co. 79. In the case of *Underhil v. Devereux*, Hill. 21 & 22 Car. 2. 1 Sand. 71. *Scire facias* to have restitution on extent upon allegation of receipt of so much profits, and tender of the rest: exception taken to it because no *uncore prift*, but yet over-ruled: And in the case of *Ledgingham v. Pophir*, 1 Mod. Rep. 77. in replevin, avowry for not doing service; plea of a custom in the manor at such a time and place in lieu of such services, suit and tender and refusal held good. Besides, *uncore prift* is no where necessary that I know of, but where the duty is demanded; here is only covenant, which is not to recover the duty, but damages. (d) But were it otherwise, where-soever the money is payable to a stranger, or at a particular place, there needs no *uncore prift*, as in *Moore* 37. pl. 120. Debt on a bond conditioned to pay to the * obligee or such as he should appoint; the defendant pleads that he appointed J. M. and the defendant tendered, and J. M. refused; good without an *uncore prift*. (e) And the reason is plain, because the plaintiff was never to have it, but the stranger, and he ought no more to have it now than before: the case of *Powell v. Nevill*, 1 And. 4. is the same: And it is in *Dyer* 150, 151. pl. 84. per CATLIN and GRIFFIN, where it has a particular place of payment appointed, there it cannot be paid in another place, and so no need of an *uncore prift*. And so is the case of *Nicholls v. Fitz. John*, Trin. 7 Hen. 4. 18. it is pl. 17. and held good without it, because not bound to tender in another place; so is *Perkins* 15.

TREMAIN *e contra*, That to set forth the custom of merchants here is as necessary as in any case, and that there was no reason of a difference between a declaration and a plea as to this purpose, and that an *uncore prift* was necessary, as in the case of *Newton v. Newton*, 2 Roll Abr. 523. That if a man covenant to pay the plaintiff ten pounds after *Michaelmas*, and before *Easter*; a plea of tender and refusal is not good without saying *uncore prift*.

POLLEXFEN Chief Justice. As to that of the law of merchants, I think we are bound to take notice of it, as we do of that against survivorship and account, and this is as well known; and their declaration is, that he did draw bills *secundum consuetudinem mercatorum*, and if this be good, theirs is so.—Then for *uncore prift*; there is no necessity for it in any case of covenant, where damages and not the debt is in demand.

VENTRIS Justice. As to the appointment, this will not make an order at common law, because there are two indorsements; and if I give my servant an authority to receive, he cannot authorize another; otherwise if but one; then payment to the first indorsee would be a payment to the person (f), therefore you here

(d) 1 Vent. 356. 11 Mod. 270. Salk. 596. 2 Burr. 1120.

(e) But see now 4 & 5 Anne, c. 16.

(f) See *Bacon v. Searles*, 1 H. Bl. Rep. 88.

depend

depend upon the law of merchants, which at present I think we ought to take notice of.

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THEY ALL inclined to reverse the judgment; but upon TREMAIN's importunity *adjournatur*.

And the next term the judgment was reversed, THE COURT holding our plea to be a good plea.

NOTE, The case cited by TREMAIN in *Roll's Abridgment*, was debt, and so not to the purpose.

• • Watson against Clarke.

Case 109.

* [131]

I MOVED for the discharge of a rule for a *procedendo* in an action for calling one "whore" in LONDON. But before declaration, or any thing done there but *plaint*, we bring an *habeas corpus*, and I opposed the *procedendo*, because they made no return of it; here was nothing did appear to the court of the custom (a), and they ought to return it.

Prohibition does not lie for a suit in London, for calling a woman "whore."
S. C. Comb. 178.
S. C. Carth. 69.
75.
S. C. Holt 428.
2 Term Rep. 473.

HOLT Chief Justice was of that opinion.

But DOLBIN Justice said, the constant practice upon oath made by affidavit is that the words were spoke in *Latin*.

And so they got a *procedendo*, against the opinion of HOLT Chief Justice.

(a) See *Blasquine v. Hawkins*, Dougl. 378. and *Staunton v. Jones*, Dougl. 380. notis.

The King against Geary.

Case 110.

ERROR to reverse an attainder of treason, in an indictment at a session of oyer and terminer, for levying war in Somersetshire, with *Monmouth* and his adherents; and the defendants *Adtunc et ibidem venerunt in propriis personis suis et petunt audit' indictment' et eis legitur, quibus lectis et auditis dicunt et quilibet dicit quod sunt et quilibet est culpabilis modo, &c. super quo visis et per curiam hic intellectis considerat' est per eandem cur' hic quod, &c.*

Indictments, while the law proceedings were in *Latin*, were to be read to the prisoner in *English*.
1 Sid. 85.
3 Bl. Com. 322.

Upon argument I URGED these errors,—First, That though the indictments be in *Latin*, yet they are not to be read to the prisoner but in *English*: for it is the matter, and not the form they must answer to. In other countries the prisoner hath nothing but a verbal charge against him, and so is the express resolution in *Sir H. Vane's case*, 1 Sid. 84.

SECONDLY,

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The record of an indictment for high treason must shew that the prisoner was in custody.

SECONDLY, A man cannot plead to a capital crime but in custody, and *non constat* here that he was in custody; there is no entry *Quod commissus fuit*, &c. as the precedents are. In *Mrs. Calai's case* on a writ of error, it was held to be error, because he did not say in whose custody she was, but only *in custodia* generally, and that was a judgment on commission of oyer and terminer.

If there be no arraignment entered on a record of treason, it is error; yet if the prisoner had oyer of the indictment that imports it.

3 Mod. 265.
3 Salk. 356.
Comb. 144.
Holt 269.

2 Hale P. C. 219. 4 Bl. Com. 318.

* [132]

In a record of treason if it do not appear that the prisoner was asked, "What
" he had to say
" why judgment should
" not be given,
" &c." is erroneous.

S. C. 3 Mod. 265.

S. C. 2 Salk.

630. Plow. 387. Co. Ent. 532. Raft. Ent. 455. 2 Hale P. C. 220. 4 Bl. Com. 318.

THIRDLY, There is no arraignment; and by the common law a man ought to be arraigned, for he may plead *misnomer*, or want of *addition*, and the like; and all the books, as * STAMFORD, COKE, HALE, and the rest do all speak of arraignment as necessary, for according to *Hale* 212. a man at the time of his arraignment ought not to be in irons. And as I am informed in *Hambden's case* the entry is "*allocatur quia dicere possit*," and so are the precedents in *Rafall's Entries* 455. tit. "PARDON," *Statim allocutus de premissis ei impositis*, so is *Coke's Entries* 532. and in the *Earl of Leicester's case*, *Plowden* 387. It is in all these "*Et commit' et statim duct' ad barram allocut'*," these are all confessions too.

FOURTHLY, There is no *allocutus* before judgment; and all the precedents are so; and the law requires that of necessity; for he might have a pardon to plead, or he might move in arrest of judgment.

PER CURIAM, Judgment reversed. But by *DOLBIN Justice*, Oyer of the indictment is tantamount to an arraignment, though for any thing appears there might only be a copy given, as in civil causes, and not read in court.—ALL HELD the last to be a fatal exception.

The African Company *against* Bull.

Case 111.

AN action on the case was brought by the plaintiff upon a policy of assurance. The defendant pleads a custom of merchants, that if any writing or policy of assurance be made and subscribed upon any kind of goods on board any ship, such goods are to be deemed upon account, and if such a number of assurers should subscribe such writing to pay divers sums of money, as should amount to the value of the goods mentioned to be assured, then all other ensurers that should subscribe after such number, by which the money, so subscribed amounted to the value of the goods, were used to be discharged from payment of the sums they subscribed, though such goods were wholly lost, and were to return their premium; that the policy in the declaration was upon account; that the goods the plaintiff had on board were worth but £.2,240; that twenty-three men had subscribed one hundred pounds each, &c; that the defendant was the next subscriber; that by reason of those subscriptions before his, he was discharged from his promise, &c. and bound to pay back his premium, and did offer the same, &c. The * plaintiff replies, that if any such a number subscribe to the value, and none prove insolvent, then to be discharged, *ABSQUE HOC* that there is any such custom as the defendant hath alledged. And issue is joined upon it. And at the trial they proved it very plainly and fully by all *THE EXCHANGE*; and that there was never an instance to the contrary, but one payment on purpose since the action commenced; that where the policy is upon the *account*, and not upon *goods valued* certain or value blank, the last subscribers are not bound as in the latter cases they are. And we had a verdict for the defendant.

LEVINS Serjeant moved in arrest of judgment, that this was an impertinent plea, and the custom unreasonable, that any should be discharged till satisfaction of the whole loss, when some prove insolvent.

I answered him, that as to the plea, though ill on *demurrer*, yet it is good after issue joined and tried; at most it doth but amount to a *general issue*, and that should have been shewn for cause on a *demurrer*; but here is a verdict. If *non culpabilis* be pleaded to an *assumpsit*, it is good after verdict: so payment without acquittance to debt on a single bill. *Nil debet* to trespass is not proper to trespass, and therefore ill; but if the plea hath the colour of a bar, and doth not contain matter of bar, as *accord* without *satisfaction*, it is good, *Yelv.* 227. *Cro. Eliz.* 495. *Moore* 692. 3 *Cro.* 259, 778. *Moore* 687. Besides, we did give this in evidence as we might on the general issue; but their importunity imposed on the court that we ought to have pleaded it, and we were forced to pay twenty-four pounds costs for this liberty, and by consent in a rule we did it. Then as to the reasonableness of the custom, it is highly so; for it is equal between insured and insurer; for the last subscribers return

A custom of merchants that, in subscribing a policy of insurance, the underwriters, in the order they subscribe, shall be liable to the amount of the loss; and that the subsequent underwriters shall return the premium, and be exonerated from responsibility, is good.

S. C. Gilb. 238. *Post* 156. *Dougl.* 656. *notis.*

* [133]

A plea amounting to the general issue is bad on *demurrer*, but good after verdict.

Ante 76. 1 *Roll Rep.* 113. 2 *Roll Rep.* 350. *Cro. Eliz.* 871. 5 *Com. Dig.* Pleader (E. 14)

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their premium (except ten pounds for subscribing) if there be no loss, when the value of the goods amount not to reach them; nor are the first subscribers at any disadvantage, for they keep their premium if the goods come home safe when we return ours; and in truth those to whom the value will not reach are never obliged. And as to the insolvency of some, we answer that each in insurances do only engage for his own sum, and to make good the loss of goods, so far as the sum he subscribed amounts to, not to make good others' insolvency; and there never was a custom better proved; for if ten subscribe one hundred pounds each, and the goods be nine hundred and fifty pounds, the last stands at half loss. This * was proved. If no goods come home, the insurer hath all his premium returned, and so it is for his advantage, to have this custom preserved; and these kind of insurances are made upon accounts when a merchant doth not know whether his factor will send home any goods or how much.

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CURIA. The plea is ill, if upon a *demurrer*; but good *after issue* joined, and you put them upon it, and the custom is reasonable.

And PER TOTAM CURIAM, Judgment for the defendant.

• Hilary Term,

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The Second of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.*

Sir GILES EYRES, *Knt.*

} *Justices.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Nightingale and others against Bridges.

Case 112.

Michaelmas Term, 1 Will. & Mary, Roll 397.

TROVER and conversion *de bonis et catallis sequent'*, viz. *de una nave, vocat' THE JAMES FRIGATE, oneris cent' et trigint' doliorum decem bombardis Anglice GUNS cum omnibus armament' apparat' tormentis velis funibus munitionibus, provisionibus, fideis, cymbis, et aliis suppedimentis eidem navii spectan' sive pertinent' ac etiam ducent' et duodecim ponder' librat' cibi vocat', &c.* Not guilty pleaded.

The king may create a corporation of merchants, and give them, by charter, an exclusive right to trade, and hold territories, within certain limits therein described; but a clause prohibiting others to trade

The jury find that Charles the Second, by letters patents dated the 27th of September, in the twenty-fourth year of his reign, to

within the said limits, "under pain of imprisonment, and the forfeiture and loss both of their ships and goods wheresoever found, &c. and giving power to enter into, search, and seize ships and goods," is void, for the king cannot by letters patent create a forfeiture of, or any way, by his own act, confiscate, a subject's property. — S. C. Carth. 131. S. C. Holt 473. 3 Mod. 132. 1 Roll Rep. 4. 2 Roll Rep. 113. 2 Roll Abr. 174. 1 Vern. 54. 130. 307. Hale his P. C. 162. 8 Co. 125. 11 Co. 87. Lutw. 564. Bnd. 55. Comb. 93. Stair. 132. 361. 1 Mod. 18. 1 Vent. 47. 2 Ch. Cases 165. Dougl. 222. 1 Term Rep. 118.

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"THE ROYAL AFRICAN COMPANY OF ENGLAND," (being a body corporate) did grant to them "all the regions, countries, coasts, and places, &c. beginning at the port of *Sallee* in *South Barbary* inclusive, and extending from thence to *Cape de Bona Esperanza* inclusive, with all the islands near adjoining to those coasts, and called by the name of *South Barbary*, *Guinea*, &c. and all ports, harbours, &c. to hold to them and their successors from the making the said letters patents for the term of one thousand years." And grants licence to them and no others, to send ships, &c. and to have all mines of gold and silver there, &c. and the whole, entire, and only trade, and liberty of trade there, any law or statute to the contrary notwithstanding," and "none other of his subjects to frequent, visit, or trade in those places, &c. prohibiting any to trade there unless by licence first had, under pain of our indignation, and imprisonment of their bodies during our pleasure, and the forfeiture and loss both of ships and goods wheresoever found, &c. with power to enter into, search, and seize ships and goods, &c. one moiety of the forfeiture * to the king, the other to the company:" it also erects a court of judicature to be held at such a place as the company appoints, to consist of one learned in the civil law, and two merchants, &c. the major part, (*quorum unus* the lawyer) "to have conuſance and power to hear and determine all cases of forfeiture and seizures for trading thither." The jury find further, 4 September 1684, the Company granted a commission under their seal to one *John Laſtall*, reciting the grants and powers of their said charter to command him, captain and commander of *The Orange Tree* Frigate, then in their service, and all subordinate officers and seamen, to seize all ships trading, &c. and whatsoever they take in their outward bound voyage, they are to carry to land safe, and there to deliver them to the agent and council of factors, there to be proceeded against in THE COURT OF ADMIRALTY there established. That *John Bridges* the defendant was one of the officers in the ship called *The Orange Tree* at the time of setting out, and at the time of making the said commission. That the 28th of February 1693. the company made another commission to *Henry Nurse*, *James Hulet*, *W. S.* and *R. W.* or any two of them, reciting the power of their charter, did constitute and appoint them judges of the admiralty there, and to execute those powers according to such instructions as they should send. That *John Laſtall* before taking of the plaintiff's ship died; that *John Bridges* after his death was commander of *The Orange Tree* Frigate; that the plaintiff being owner of the ship and goods in the declaration, did trade in an infidel country, in, and with these ships and goods to certain places within the limits of that company. That *John Bridges* did seize, take, and carry away the plaintiff's ship and goods upon the high sea in his outward bound voyage, and afterwards carried them to the fort of *Lane Corfe* in *Africa* aforesaid, against the will of the plaintiff, and the master and seamen. That at the defendant's instance there was a process in the said Admiralty Court against the said ship; that none appearing for her there was a condemnation, &c. *Sed utrum* the defendant be guilty, *Ignorant, &c. Et si pro Quer.* Damages to four thousand three hundred pounds, and costs to *£. 2. 3s. 4d. Et si pro defend.* &c.

This

This special verdict was obtained at the importunity of their majesties' council for the defendant; I therefore was prepared to argue as follows for the plaintiff.

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* THE QUESTION is, whether any thing here found can justify the taking and carrying away the plaintiff's ship and goods. I am to argue that here is nothing, either precedent or subsequent that can justify the defendant's taking. I shall not controvert the legality, usefulness, or necessity of settled companies for the managers of foreign trade, nor the prerogative of the crown in erecting such societies, nor the giving liberty exclusive of others. (a) At present it seems to me an unnecessary task to deny, or disprove the validity of the prohibiting clause; but, MY LORD, my endeavours shall be to make out this. 1. That the defendant had no power to seize. 2. That clause in the charter is void and illegal. 3. That their new erected court is illegal being for this purpose in particular. 4. That if it were legally constituted, yet the condemnation subsequent will not justify the precedent tortious conversion: and that lastly they have not pursued their charter.

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It cannot be denied me that the subject of England hath an undoubted property in his goods and possessions; now this property cannot be transferred or divested, but by the consent of the owners, either express or implied, as by gift, dereliction, or forfeiture; this last only concerns our present question. It must be agreed, that the common law hath not ordinarily made this our trade, as found in the special verdict, to be a forfeiture or cause of seizure: I believe they will not contend this, that antecedent to their charter, our trade was unlawful under pain of losing ship or goods, and then the king cannot by any prerogative whatsoever, create either a new cause or a new mode of seizure, and either of them will serve my turn. To the altering of a property of a subject's goods, a parliamentary assistance is requisite, and that is the fittest way for ordering that fundamental property which the subject hath in his goods, because each subject's vote is included in whatsoever is there done: an act of parliament hath the consent of many men, both past, present, and to come; as it is in *Hob.* 256. The statutes that have been made for this purpose are an evidence of this, or otherwise they were needless, idle, and unnecessary: those acts that regulate, those that take away, and those that enforce a new purveyance upon the king's royal progresses do sufficiently prove this. The king's prerogative, as it is given, so it is bounded by the law: I shall first shew it by some more general authors, and then more particularly and closely * demonstrate it to be so in the case now before your lordship. BRACTON (b) says thus: "*Ipse autem rex non debet esse sub homine sed sub deo et lege, quia lex fecit regnum, attribuat igitur rex legi quod lex attribuit ei, &c.*" and (c) "*REX. non potest gratiam facere cum injuria et damno alieno, quod autem alienum est dare non potest per gratiam suam;*" nay, though it be for the public good, he cannot do it

* [138]

(a) 5 Com. Dig. "Trade."
(b) Bk. 1. ch. 8. fo. 5.

(c) Bk. 3 fo. 132.

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without the implied consent of the proprietors in parliament, as I shall shew presently. Though the authority of those ancient treatises hath been sometimes controverted, yet they have always been allowed as evidence of the fundamental and general constitutions of the realm. But to use more modern authorities. In the case of *Thomas v. Sorrell*, (d) it is laid down as a fundamental rule, that in life, liberty, and estate, every man who hath not forfeited them, hath such a right that the law allows him to defend, and means for so doing, that if it be violated, it gives an action to redress the wrong and punish the wrong doer. The law is the highest inheritance which the king hath (e), for by it the king and all his subjects are ruled, and if the law were not, there would be neither king nor inheritance. *Davis's Rep.* 40, 41. The kings of England have always claimed a monarchy royal, not a monarchy feignoral; "under the first" (says he) "the subjects are freemen, and have a propriety in their goods, and freehold in their lands, but under the latter they are villains and slaves;" and, my lord, this propriety was not introduced into our land, as the result of princes edicts, concessions and charters, but was the old fundamental law, springing from the original frame and constitution of the realm. In *Francis's case*, (f) COKE sets down this as a rule, "*quod nostrum est, sine facto, sine defectu nostro amitti, seu in alienum transferri non potest.*" And the common law gives a true property in contradistinction to the superintendant power, and for this purpose it distinguishes between bondmen, whose estates are at their lord's will and pleasure, and freemen, whose property none can invade, charge, or take away, but by their own consent; a several property in the subject is so sacred as nothing more. The king cannot dig for salt-petre in a mansion house, or barn filled with corn, without the owner's consent. (g) He cannot alter the course * of descent, or by charter make land to be devisable which was not so before, or make it deviseable when it would otherwise descend to a single heir. (h) And so *à contra*, he cannot make it descendable to the heir where it is dividable, as in *gavelkind*; for if otherwise, there had been no need of the act of parliament concerning Kentish lands: he cannot dig for gravel in the inheritance of his subject "*maugre son soen*," (says the book) (i) against his will. A custom to pay toll for all cattle driven over a man's private freehold, shall prevail against the prerogative and bind the king, 46 *Edw. 3.* cited in *Plowd. Com.* 236. *Lord Berkeley's case*: all which proves a property in the subject. But to come closer. No forfeiture can be of goods by charter without an act of parliament; and so is *Coke* (k) in his Comment upon "*nullus liber homo disseisitur—de libertatibus suis*," which he interprets property in goods, as well as other franchises and liberties which the subject hath: this charter and clause can give no power therefore to seize a man's goods, as forfeited, which the whole matter found shews

(d) Vaugh. 337. 4 Bac. Abt. 186. 188.

(e) 19 Hen. 6. pl. 63.

(f) 8 Co. 92.

(g) 12 Co. 12.

(h) 49 Affize, 8.

(i) 11 Hen. 4. pl. 28.

(k) 2 Inst. 47.

they did; for that no such forfeiture can be created or made by charter. Even for defence of the realm, the king cannot seize a man's goods without his consent in parliament, and this was *Mr. Hambden's case* in the time of Charles the First. (1) Much less can it be done for the private benefits of a particular company; and it was agreed by those who argued in that case for the king, that the subject could not lose the property of his goods but by act of parliament. Now this property being so preserved by the law, the king cannot by any ways alter this law but in parliament, or make that a forfeiture or cause of seizure, which was not so before: for as FORTESCUE says, (m) "a king of England cannot alter or change the laws of the land at his own pleasure." And the same thing thus: (n) "he cannot take away any of his subjects goods without satisfaction for them:" nor can the king by parliament or charter impose any new penalty or make any new offence; and for that the 31 Hen. 8. c. 8. is a full and express authority, for by the statute (which was the wonder of the age) the king might with the advice of counsel, two bishops, two chief justices, and others, make ordinances for the punishing offences, and imposing penalties, which should have the force of a law, but with this "PROVISO, that no man's property or goods should be impeached; nor the common law, or statute law of this realm * prejudiced," and yet however it was thought so dangerous a power, that the act itself was repealed. (o) In the case of proclamations about buildings, it is there held, (p) that "the king cannot by his prohibition, or proclamation, or otherwise" (says that book) "create an offence which was not an offence before, for that is to change the law, which was not in his power," and there, in that folio, is cited the case of an act made, by which foreigners are licenced to merchandize within London. King Henry the Fourth by proclamation prohibited the execution of it, and that it should be in suspense, but *usque ad proximum parliamentum*, and it was resolved by the two chief justices, chief baron, and baron ALTHAM, that a proclamation cannot alter, or make an offence: now charters and proclamations are both of the same equal authority, both under the great seal. But perhaps they will object, that *infidels* are *alien enemies*, and to trade with them is unlawful, and therefore a seizure lawful. To which I give a double answer. FIRST, by denying the assertion: and SECONDLY by denying the consequence. FIRST, It was not unlawful at the common law, for that is coeval with the inhabitants of this island. I shall not attempt to prove its antiquity, though I might prove it here even before *Livy's* time, and consequently prevalent here before christianity, and then it could be no crime, and no statute since hath made it so, nor can I find any pretence for such an opinion in the books; there is nothing but *Michelbourn's case*, 2 *Brownl.* 296. and that is but a short and imperfect note of a case, and all that it

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(1) 1 State Trials, 483. See also p. 5.
appendix to 6 St. Tr.

(m) Fortescue de Laudibus Legum Angliæ, ch. 9. fo. 25.

(n) Fortescue, ch. 36. fo. 84.

(o) By the statute 1 Ed. 6. c. 12.

(p) 12 Co. 75.

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amounts to is this: that the king may restrain his subjects from commerce with them, which argues nothing to this purpose here in our case, and it is plain that commerce is allowable with THE JEWS, which according to the gospel are greater enemies to christianity than the gentiles are. That it was not unlawful antecedent to their charter, appears from the statutes, for they open the seas to all merchants for all manner of trade, as 18 Edw. 3. st. 2. c. 3. "that the seas are open to all manner of merchants to pass with their merchandizes where it shall please them," 2 *Rolls* 180. Besides, the charter prohibits trade there, not because it is inhabited by infidels, but doth indefinitely forbid all but the company, whether the country shall be christian or pagan. SECONDLY, It is no argument that they were *infidels*, and trade with them might be prohibited, that therefore the goods should * be forfeited; no more than the power of the king to restrain card playing would confiscate the cards, which, in *Darcy's case*, (q) is agreed. I will suppose their principle true, that they are *perpetui inimici*, and then according to that notion a trade with them is treason, as an abetting of the king's enemies; and yet even in that case there ought to be no seizure of the offender's goods till conviction, or at least indictment or inquisition: but further, I will suppose their charter makes it unlawful, yet it cannot impose the penalty of confiscation of goods, for by MAGNA CHARTA no man is to be dispossessed of his property but by *legale judicium parium suorum*. And, MY LORD, I take it for a truth, that in all parts of the world where the Englishmen are under the government of any English subjects, their rule must be the laws of this land, and if they punish without jury, they may be punished for it by action of trespass when they return hither, and this we have in practice here every day in case of the insolency of governors in plantations, as in the *East Indies* and *Barbadoes*, and they cannot proceed there but in the methods allowed here. Trial by a jury is the right of every English subject all the world over, wheresoever English men have the command by authority derived from the crown of England: now the law of England says, That if goods be forfeited for an offence, there must be a *conviction* of the offence in the methods of the common law, and those methods cannot be altered but by act of parliament; the king can no ways change it; even in the case of felony he cannot alter the execution from hanging to beheading; for that so he would alter the nature of the sentence. (r) Nor can the king erect A COURT OF ADMIRALTY to do such work in the same. There were commissions in English under the great seal directed to divers persons within the counties of *Bedford, Bucks, Huntingdon, &c.* (s) to inquire of divers articles, as depopulation of houses, conversion of arable land into pasture, &c. though these things were offences, yet the commissions were held illegal because unusual and in English, and not said how they should enquire: In Hilary Term, 9 Jac. 1. there was a question, (t) if the justices in *Wales* might be by commission, and held they could

(q) 11 Co. 84.
(r) 12 Co. 130.

(s) 12 Co. 31.
(t) 12 Co. 48.

not, for the 24 Hen. 8. c. 28. which gave power to alter, change, and reform all matters, &c. being so dangerous a power was held not to go to the successors. The king cannot grant, that any * one shall be sued otherwise than according to the English common law, as the case of the *Chancellor of Oxford*, 8 Hen. 6. 19. A grant that the Vice Chancellor should not be sued for debt or trespass concerning his office void, *pari ratione* he cannot appoint a man to be sued according to the civil law, and so was the grant to the university, that they should sue in the Vice-chancellor's courts for causes *infra* Oxford ill, and in the 13 Eliz. an act was made for it. (u) In the 42 *Affixes*, pl. 5. there was a commission under the great seal to sundry persons of credit, to take the body and goods of H. without indictment and due pleading of law, and damned as unlawful; and much the same is our case with that of Oxford. *Agar's case* is express, (x) that such grant was void in 8 Hen. 4. He cannot erect a court of equity; (y) he cannot at this day make a manor; (z) he cannot create an honour but by act of parliament. (a) He may grant consuance of pleas within a certain precinct, but not otherwise than *secundum legem et consuetudinem regni*. (b) Now the offence, if any, was upon land; it was trading in an infidel country; so that supposing it an unlawful thing it ought not to have been seized first, nor condemned in that manner. In *Sander's case* (c), they are so very shy of this clause, that when *oyer* was craved of their patent and set forth, they cautiously omitted this clause for the forfeiture of ship and goods as ashamed of it, and this was taken notice of both at bar and bench. The prerogative was then strained even to the utmost, and yet agreed by them all, that this clause was not justifiable; and in that very case it was agreed by the Bench that the distinction between infidels and others as to this purpose was trivial: the king's prerogative and superintendence over trade was the topic insisted on; the other was pressed at the bar, and so is *Jeffrey's* printed argument. In the *case of the Russia Company* erected by Philip and Mary there was such a clause as this, but they never ventured to use it till made effective by act of parliament, 8 Eliz. c. 1. **OBJECTION**, Their taking was only a seizure *in ordine ad*, &c. **ANSWER**, It is not found that they had information of our trading, and it is found generally that they took and carried away the ship and goods; and now to seize before suit, and without suit is much at one. Besides, the power under which they justify is to seize as forfeited, and at the defendant's request it is condemned as forfeited, and the whole * tenor of the juries finding is that way. The defendant was no officer of the admiralty, and therefore his service could not be by authority from that court in a way of process, or in order to examination, or the like; and therefore his seizure was certainly *tortious*, for he had no power but under that clause in the charter, which is void in law. Then this subsequent going to their supposed court of admiralty cannot justify that *tort*. For first, I think,

(u) Jenkins Centuries, 2. Cent. 88.

(x) 2 Roll. Rep. 164.

(y) 12 Co. 51. 13 Co. 32.

(a) See the case of March v. Smith, 1 Leon. 26.

(a) King v. Levett. 1 Bulst. 196.

(b) 12 Co. 51.

(c)

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by the authorities cited, the king cannot erect such a court only to condemn goods upon a supposed offence according to the charter, without a jury. Then their court is constituted not to proceed according to the charter, but according to the instructions which the company should from time to time send for that purpose. As to the case of *Hughs v. Camelin*, (d) that was *trover* brought against the vendee of a ship taken by the French in time of war, and condemned as a Dutch prize, and afterwards bought by the defendant. The reason of that judgment was the credence we give to those courts abroad; but here we bring not our action on a demand and denial, after the sentence, against one that bought it upon credit of that sentence, but for an actual conversion before; here is a seizure by English men, under pretext of a void power, and a sham condemnation afterwards to justify it. In the case of *Beake v. Tirrel* (e), last Easter Term in this court, where in trespass the defendant pleaded a caption as a prize, and a condemnation by the East India petit admiral, pursuant to it; I remember one of the reasons alledged by your lordship for over-ruling that plea was, that the subsequent going to the admiralty could not justify the first illegal caption. Here is no war to warrant a seizure; no proclamation or other profession of hostility; but an amity implied by their charter that prohibits us as to trade there, which supposes that otherwise it would have been lawful for us. The argument from the writ of *ne exeat regnum* affects not this case, though it might in the question of trade, if an action or information had been brought for it. The charter requires the admiralty court to be held before two merchants, and *non constat* by the sentence found that either of the judges were merchants.

* [144]

* The other side thinking the pretence of *forfeiture* too gross to be insisted on, had no counsel to argue it; so we had judgment *nisi*, before the end of the term.

Trover for taking goods, viz. a ship with all her apparel, ropes, guns, provisions, and also ten pounds weighed of, &c. to the said ship belonging is certain to a common intent and therefore sufficient.

S. C. March. 188.

1 Vent. 114.

S. C. Carth. 131.

2 Vent. 67. 78.

Hard. 111.

1 Sid. 98. 2 Sid. 174. Cro. Jac. 664. 699. Stiles, 235. 1 Lev. 303. Cro. Eliz. 819. Skin. 289. Ld. Ray. 1529 2 Salk. 654. Stra. 738 4 Term Rep. 206.

And the last day of the term MR. SERJEANT TREMAIN took exception to our declaration for its uncertainty. FIRST, It being "*provisionibus*" which signifies "victuals," and that might be victuals out of the ship as well as in it, and no quantity or certainty mentioned, he urged it was ill. SECONDLY, It was "*ducent' ponderis librat.*" which signifies "pounds weighed," i. e. the weights themselves, and therefore ill, or otherwise it is uncertain which is meant, and therefore ill: he excepted to some other words, &c.

The answer I gave, that the word signifies only "necessaries for the ship," and must so be intended here, for it is "*eidem navi spectant' sine pertinent.*;" so that it is reduceable to a certainty, and when so, it is well enough; as in case of a *study of books*, yet well though uncertain how many or what sorts; because there is an addition of "*study*" which limits and ascertains it. So was the case of

(d) Michaelmas Term, 34 Car. 2. B. R.

(e) Ante, 6.

Mayhew

Mayhu v. Flower in *Sid.* 98. in trover "*de plancis granariis*," ANGLICE "planks of the granary," otherwise it had been of "planks" generally. And so is the case of *Elphique v. Aston*, (f) for "a library of books." So trover will lie of "a trunk with divers goods in it." *Prior v. Tuft.* (g) So for "a piece of linen," "a parcel of thread," "a pack of linen," "a piece of brandy (b)"; if so certain that the thing may be known, and the jury may be supposed able to value it, it is well enough. Besides, in *trover* there needs not that precise and exact certainty as there doth in a *replevin*; there the thing itself is to be returned, here damages only; and the books are full with an abundance of cases, where in *trover* greater latitude is allowed than in other actions.

This is *after verdict*, and not on *demurrer*.

As to the other exceptions I URGED, that being after a verdict it must be intended that damages are given only for what is sensible; so that if sensible, it is enough, for then the jury could know and value it. If not, no damages were given for it, but for the other things that are sensibly expressed; as in case of divers words spoke at one time, and that resembles this. (i) But in *trover* I cited divers cases where it was so adjudged after verdict, especially the verdict being generally for the plaintiff. Otherwise say some books if the jury find the defendant not guilty as to part, and guilty as to the rest; for then say they, it is plain the jury considered every part, and gave damages for every such particular so found.

* THE COURT held all for the plaintiff. And as to the first, HOLT Chief Justice held, that "*provisionibus*" was well enough, though it should be meant *viatuals* upon land, for *navi pertinent* made it certain enough. And so we had judgment for the plaintiff.

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A difference where the jury find for the defendant generally, and where they find as to part for the defendant and part for the plaintiff and some part of the demand is insensible.

1 Roll. Abr. 567.
10 Co. 130.
Moor. 142.
1 Salk. 133.
3 Burr. 1235.
Doug. 377. 730.
3 Term Rep. 433.

* [145]

(f) 2 Roll. 763.

(g) 1 Keil. 825

(b) See *Jemy v. Norrice*, 1 Mod. 295.
Lev. 303. 1 Vent. 105.

(i) See *Jaxon v. Tanner*, Cro. Car. 236.
Peirson v. Gooday, Cro. Car. 327. and
Chamlet v. Griffin, ante, 80.

Case 113.

Phyler *against* Boson.

IF THE RECORD be *coram majori et ballivis civitat' Exon' ac ballivis curie provostie ejusdem curie*, and THE *PLACITA coram ballivis dict' civitatis*, it is not the same record.

S. C. Post. 186.
319.
S. C. 3 Salk.
130.
Post, 186.
Ante, 26.
1 Roll. Abr.
754.
Cro. Jac. 254.
1 Salk. 264.
Cowp. 178.
1 Term Rep.
782.

ERROR upon judgment in trover in the provost court of the mayor of the city of Exeter.

For the defendant in error, I argued, that the writ was abated; for it was a writ upon a judgment in *quadam loquela coram tunc majori et ballivis civitat' Exon' ac ballivis cur' provostie ejusdem civitat' et coram, &c.* The word returned is, "*placita, &c. in cur', &c. tent' coram JOHANNÉ GAUDY, JOHANNÉ DANDY, HENRICO NEWCOMBE et OLIVERO MUSTIAN, ballivis dict' civitat' &c.*" Now the record is not removed, for they are not said to be bailiffs "of the provost court," but "only bailiffs of the city." It is true, the writ may be directed to many, and returned by some of them, as by one sheriff, bailiff, &c. yet the *placita* returned must be before the same persons which the writ supposes the judgment to be; and in truth there is no such court, as "before the mayor and bailiffs and the "bailiffs of the provost court," for they are two distinct courts, *viz.* one before "the mayor and bailiffs," and another before "the bailiff of the provost court;" and if the case of *Guy v. Adam* be law, that they are several stiles then either may do; this is neither, for it is not "*ballivis cur' provost.*"

And the writ was quashed *PER CURIAM*.

Vide the case of *Spry v. Mill*, *Stiles* 203. *Dyer* 206. *Sid.* 139. *Cro. Jac.* 313. *Dyer* 188. of seeming uncertainty in *trover* to have warranted the declaration, but these were not used because the writ abated.

Case 114.

* *Lechmore against* Toplady.

* [146]

Judgment for the defendant in *trespafs* on a special verdict is a good plea in bar to *trover* for the same goods.

S. C. 2 Vent.
169.
S. C. 3 Mod.
236.
S.C. Comb. 123.
3 Mod. 2.

Cro. Eliz. 667. 6 Co. 7. Cro. Car. 35. Cro. Jac. 73. Ld. Ray. 1217. Salk. 368. 2 Stra. 1078. Bull. N. P. 34. 48. Term. Rep. 273.

TROVER and conversion in the Common Pleas. For the defendant we pleaded judgment in the King's Bench upon special verdict in *trespafs* for the same goods, and the goods in the one and the other were the same, and conversion, and taking the same, &c. The plaintiff demurred.

And, upon argument, THE WHOLE COURT were clearly of opinion that it was a good bar, upon the authority of *Ferrer's case* (a), and that notwithstanding the case of *Putt v. Royston* (b) in the King's Bench adjudged by PEMBERTON *contra*.

(a) Cro. Eliz. 667. 6 Co. 7.

(b) Raym. 472. 2 Mod. 318. Pollexfen 634. Skin. 48. 57. 3 Mod. 1.

POLLEXFEN *Chief Justice* said he was never satisfied with, the case of *Putt v. Royston*; and, as he remembered, a writ of error was brought, and the judgment questioned: but he afterwards agreed, that he saw no difference between a general and a special verdict.

LECHMORE
v.
TOPLAND.

However THEY ALL THOUGHT a judgment in the one a bar to the other, for that the actions were of the same nature. And judgment for the defendant.

I did not argue this, because in the Common Pleas, but advised and drew the plea; and so my poor widow was quit of them at law in both courts.

Rottenhoffer against Lenthall.

Case 115.

DEBT on a judgment in an action on the case against *Lenthall* as superior officer for an escape permitted by *Ellis*, in which we had five hundred pounds damages on a writ of enquiry. The defendant pleads in abatement a writ of error pending; and I demurred.

To debt on a judgment in the King's Bench the defendant cannot plead, a writ of error depending.

And upon argument it was held, PER TOUT LE COURT to be no plea, and that the law was always taken to be so till one case in SIR FRANCIS PEMBERTON's time, when a difference was made between in bar and in abatement. (a.)

S. C. Carth.
136.
Ante, 98.
1 Roll. Abr.
604.

But PER CURIAM it was all one: And judgment for the plaintiff.

1 Sid. 236.
Ray. 100.
Carth. 1. 197.
4 Mod. 247.
1 Com. Dig.
"Debt" (A 2.)

And afterwards they pleaded it in bar; and we had judgment. Vide 2 Keble 653. 659. 753.

5 Com. Dig. "Pleader" (2 W. 39.)

(a) This was the case of *Rogers v. Mayhoe*, Trinity Term, 3 Jac. 2. Carth. 1. and in conformity to the distinction then taken, a writ of error pending was afterwards pleaded in abatement, and held good, *Abdy v. Buxton*, Carth. 191. but it is said that this is the only instance in which such a plea has ever been allowed, Carth. 136. for a transcript only and not the record itself being removed, an action of debt will lie on a judgment, as well after error brought as before, *Adams v. Tomlinson*, 8 Sid. 236. *Gale v. Till*, 3 Lev. 397. and

this point is said to have been settled upon an appeal to parliament, *Grandvill v. Deighton*, Skin. 388. See also ante, 98. and 4 Bac. Abr. 681. But the Court will exercise its discretion according to the circumstances of the case, and stay the proceedings, until the writ of error is determined, *Tafwell v. Storee*, 4 Burr. 2454, *Grebbe v. Abbott*, Cowp. 12. *Entwistle v. Shepherd*, 2 Term Rep. 78. *Christie v. Richardson*, 3 Term Rep. 78. *Pool v. Charnock*, 3 Term Rep. 79.

Case 116.

* Venable against Daft.

* [147]

Judgment arrested because it appeared by the *general memorandum* that the action was commenced before the cause of it arose.

S. C. Carth.

113.

S. C. Holt. 38.

Jones 304.

1 Vent. 135.

2 Vent. 174.

Cro. Car. 272.

282. 575. 2 Lev. 197. Cro. Eliz. 325. Stra. 1271. 1 Will. 171. Dougl. 62. 1 Term Rep. 116.

CASE for words spoken the fifth of November last. The declaration was generally, as of Michaelmas Term, and verdict for the plaintiff and thirty pounds damages.

MR. NORTHEY and I moved in arrest of judgment, for that the declaration was of the first day of the term before the cause of the action did accrue, according to the case of *Jenkinson v. Thompson*, in an information *qui tam*, &c.

HOLT Chief Justice declared himself dissatisfied with the judgment in JEFFERIE's time, which was to the contrary.

And judgment was arrested. (a)

(a) This may be pleaded in abatement, 2 Lev. 197. Hob. 199. 245. 2 Com. Dig. Abatement (G. 6.) or may be assigned for error, Cro. Eliz. 325. 1 Leon 186. 1 Com. Dig. "Action" (E), but it has been allowed to be rectified by an examination of the real time of filing *the bill*, 1 Sid. 373. 2 Keb. 368. 1 Vent. 135. 2 Lev. 13. or of the

time when *the bill*, to which the bill relates, was filed. 1 Sid. 432. 2 Lev. 176. T. Jones, 87. but the better and more usual way is to file a *new bill*, and to amend by it, Stra. 583. 1151. 1162. 1 Will. 104. Tidd's Practice, 191. Dougl. 62. Pugh v. Robinson, 1 Term. Rep. 116.

* Easter Term,

* [148]

The Third of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Lacker *against* Harcourt.

Cafe 117.

CASE *against* the defendant laid in *Somersetshire*.—

I MOVED to change *the venue* upon the account of the defendant's privilege, as an attorney and clerk in court, and to have it laid in *Middlesex*, and shewed several rules wherein it had been done, as for *Mr. Bathurst*, and urged the practice for it, and the reason of that practice, *viz.* their supposed constant attendance on the Court here.

But denied by CHIEF JUSTICE HOLT, *et ceteros tacentes*; for that they have no such privilege. For the plaintiff in a transitory

An attorney defendant has no privilege to change a venue from a foreign county to *Middlesex*; but if he lay his action in *Middlesex* it shall not be changed without special cause.

S. C. Holt. 76. 2 Vent. 42. Stra. 610. 322. Barnes 485. Fitzg. 40. Ld. Ray. 1556. S. C. Carth. 126. 2 Ld. Ray. 338. 4 Bac. Abr. 291. 2 Bl. Rep. 1065. 1 Will. 159.

action

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action may lay it where he pleaseth. But if an attorney be plaintiff in a transitory action, and he lays it in *Middlesex*, the defendant shall not change the venue upon the common affidavit. (a)

(a) See the cases of Bisse v. Harcourt, Par. 328. and Tardley v. Roe, 3 Term Carth. 126. Pope v. Redferne, 4 Burr. Rep. 573. accordant.
2027. Lyde v. Rodd, 1 Brown, Caf. in

Case 118.

Meredith against Allen.

Hilary Term, 1 Will. & Mary, Roll 20.

In debt on bond conditioned to pay if a ship return before such a day, if the defendant plead that it did not return before the day a replication that it did return is good without saying that he did not pay.

S. C. Salk. 138.
S. C. Carth. 115.
S. C. Holt. 544.
Cro. Eliz. 320.
289.

1 Saund. 102.
1 Sid. 340.
1 Lev. 55. 226.
Latw. 528.

3 Lev. 24.
Hard. 377.

1 Saund. 317.
5 Com. Dig.
Pleaser (F. 15.)
Comp. 578.

* [149]

DEBT on a bond. The defendant craves oyer of the condition, and (it being a *bottomree bond*) the defendant pleads that the ship was lost.—The plaintiff replies it was not lost, *et hoc petit quod inquiratur per patriam*.—The defendant demurs; and shews for cause, that no breach was assigned in the replication.

And I ARGUED that it was ill; for that the condition was to pay money, and now * upon oyer the condition was become part of the declaration; and then upon the plaintiff's declaration, there is no cause of action without breach of the condition in the replication. And I agreed that *after verdict* it might be helped; for then it should be intended the money was not paid; but here it was upon demurrer. I cited the case of *Hayman v. Gerrald*, Mich. 19 Car. 2. in this court, in 1 *Saunders* 102. and 1 *Sid.* 340.

But DOLBIN Justice said, that judgment was disapproved at that time, and it was not law, and *Saunders* answers it in his reporting of it.

And HOLT Chief Justice said the true difference is, where the matter pleaded admits and supposes a *non-performance*, there is no need to alledge a *breach*.

And so judgment was given for the plaintiff.

Case 119.

Stone against Gilliam.

An agreement to load on ship-board seven casks of brandy, is well performed by bringing them to the warehouse or the key from which the vessel takes in her cargo, and offering them to the party there to send them on board; for being cumbersome goods the tender is sufficient if they be brought to a place from whence they may be well received, and need not be carried to the ship's side. — Bro. Abr. "Tender," pl. 17. Co. Lit. 210.

COVENANT in a charter party. The issue joined was, That the plaintiff's factors at *Bordeaux* "*parati fuerunt et obtulerunt prædicto defendenti*" to load on board his vessel there seven tuns of brandies.

The evidence was, that the factors having put on board some wines by the defendant's consent; and having bought more for the plaintiff, and brought them to a warehouse upon the key in order to load on board, that they went to the defendant, and told him there was more to put on board, and offered them to him for to send to send them on board; for being cumbersome goods the tender is sufficient if they be brought to a place from whence they may be well received, and need not be carried to the ship's side. — Bro. Abr.

them

them on board; that he replied he would take in no more, for that his ship was full; whereas in truth he had room; but the war coming on, and freight advancing, and but two vessels there, he took in other men's goods.

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GILLIAM.

The point insisted on by Mr. NORTHEY was, that this was no good tender within the issue, not being brought to the ship side and there refused: and upon that we had a verdict for security; and the point reserved to my lord: whereon we attended him at his chamber.

And I ARGUED, that the evidence maintained the issue; that we did offer to the master to load them on board, and we are bound to do no more by this issue. Besides, the nature of the thing requires no other tender, the goods not being portable, but cumbersome. That the usage and way of dealing is no other than to bring them to a warehouse on the key, and then ask the master when we shall send them on board. That his refusal and filling the ship made any other tender idle, and *lex non cogit ad inutilia*. We are not here on a tender within * a condition which is to defeat an estate, and therefore strictly to be construed; but ours is on a charter party where the agreement and intent of the parties are most considerable. The question here is, if this be evidence of an *ab-tulerunt*, according to the agreement. * [150]

HOLT Chief Justice took a difference between the case of cumbersome goods, and those which are portable. That if a tender be to be made of cumbersome goods to a ship, which is moveable from one part of a key to another, I am not bound to carry them to the ship side: but if I bring them to a convenient place from whence I may load them on board, and offer the master to send them on board, that this is a good tender, &c. And, as the attorney informed me, my client did accordingly receive his money.

Knight against Cole.

Case 120.

SCIRE FACIAS on a judgment in the court of King's Bench by Sir John Knight, William Eyres, and John Knight, against John Lawford for six thousand pounds. That Sir John Knight and William Eyres died, &c; that John Knight survived: that he made his will, and made John Kent, Thomas Kent, and Mr. Downing executors and died: that they took on them the execution of the will and proved it; that Kent died, and William Downing survived him; that Lawford made his will, and made Mary his daughter, then and yet wife of Thomas Cole executrix, and died: that Mary proves the will: Thomas Knight and William Downing brings the *scire facias* against Cole and his wife, and upon a *scire feci* returned they come and plead, that Thomas Knight and William

If A. as executor of B. on receiving a legacy from C. as executor to D. give to C. a release of "all actions, suits, and demands whatsoever." Yet this will not release a debt due from D. to B. for these general words shall be restrained to the particular occa-

sion, and construed according to the intent of the parties, viz. "Demands in his own right, and not those he is entitled to make as executor."—S. C. 3 Mod. 277. S. C. 3 Lev. 273. S. C. Carth. 118. S. C. Holt. 620. Co. Lit. 291. 1 And. 64. Cro. Jac. 170. 300. 487. Cro. Ells. 606. 1 Sid. 141. 2 Roll Abr. 408. Yelv. 214. 2 Lev. 215. Salk. 575. Carth. 119. 2 Saund. 421. 1 Ld. Ray. 235. 4 Bac. Abr. 390. Comp. 599.

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Downing

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Downing ought not to have execution for that *William Downing* by release under seal did acknowledge to have received on the date thereof, of, and from the said *Thomas Cole* and *Mary* his wife the executrix of *Lawford*, the sum of five pounds, being a legacy given by the said *Lawford's* will to the said *William Downing*, and did *indeoneravit* the said *Cole* and his wife, of, and from the said legacy, and from all actions, suits, and demands whatsoever, which the said *William Downing* had had, or then had, against the said *Cole* and his wife, for any matter or cause whatsoever, from the beginning of the world, &c. Plaintiff demurs. Defendant joins in demurrer.

• [151] • The last term it was argued by SERJEANT TRINDER, and SERJEANT POWELL. And this term by SERJEANT LEVINS and MYSELF.

I ARGUED for the plaintiff, That FIRST, this release was no bar, if it had been made by the testator, and the *scire facias* by him, notwithstanding the general words: SECONDLY, supposing it otherwise, yet no bar to a suit as executor; and THIRDLY, supposing that otherwise, yet no bar to a suit as joint executor with another.— If it had been in the case of a personal right it would be no bar; for though there be general words, and the largest that can be used, yet it is apparent upon the whole contexture of it, that the consideration and occasion of giving it was only a particular demand; and the law must make that reasonable intendment upon the whole, as will restrain the general words from effecting a discharge of that particular, which was never intended or thought on by the parties. The intent must and shall govern it; (a) and this is agreeable to the rules of law in other cases, of covenants and the like, which are but agreements of the parties. It is agreed in all the books, that general words may be restrained by particular words. (b) Deeds are not taken in a grammatical construction, but according to the intent of the parties. Here it is plain the intent and contract went no further than the legacy; and this rule is the reason of the judgment in *Noke's case*. (c) And it is a certain rule, that general words shall be restrained by particular, according to the intent, if they are all in one sentence; as is the case of *Ferrius v. Plead*. (d) latter words restrained by the former, as well as *in contra*; and so is the case of *Broughton v. Cornway*, (e) and in the *earl of Clanrickard's case*, (f) and divers material cases put: when in the first part of a deed the agreement is about a particular thing expressed in the latter, general words shall be restrained by the former; and so is the case of *Garnisford v. Griffith*, (g) and *Sir George Trenchard's case*, (h) and *Napper's case*. (i) In 2 Roll Abr. 409. is the case expressly the same with this; the words are “If a man receive ten pounds of another, and by his deed acknowledge the receipt of

(a) Goodtitle v. Bailey, Cowp. 599.

(b) Co. Lit. 146.

(c) 4 Co.

(d) Cro. Eliz. 615. Dyer, 240. 255.

(e) Moor. 58.

(f) Hob. 275.

(g) 1 Saund. 60.

(h) Latch. 90.

(i) Winch. 74.

“ it,

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" it, and thereof release, acquit, and discharge him, and of all
 " actions, suits and demands; by this nothing is released but the
 " ten pounds and the action and demand for it, for the latter have
 " a reference to the first, and are so limited by them," Trinity
 Term, 5 Jac. 1. in the King's Bench cited by *Tanfeild v. d'estre issint*
adjudge; and this is the same with ours in every respect: here the
 intent is much more manifest by the specification of what the five
 pounds was for, viz. the legacy, and that was all that was intended in
 the other case: where the sum only is mentioned, it might be intended
 by agreement to be in satisfaction of every thing; here it cannot be
 so. In the case of *Abree v. Page* (k) in debt, a release pleaded of
 " all errors, actions, suits, and writs of error whatsoever, which the
 " said John for any matter, &c; and I the said John am by these
 " presents excluded of writs or suits, actions of error, or suits
 " whatsoever against him the said, &c." and because of the appa-
 rent intention only to release errors, held that nothing else was re-
 leased. And it is said by HUTTON Justice at the end of the case,
 that it was adjudged in this court, in a writ of annuity, a release
 pleaded that the plaintiff acquitted him of one half year's payment,
 and released to him all actions, suits, and demands, and resolved it
 did only bar him but of the arrearages of rent, which is much the
 same with that in *Roll Abr.* 409. *Morris v. Wife*. (l) I have a
 note of it too: covenant to save harmless from a breach in the testa-
 tor's time; the defendant pleads a release, to him as executor made
 by Lord Grandison, who married the widow, &c. " of all demands,
 " and all rights in the brewing vessels, and in the personal estate of
 " Sterling, *vel aliter*;" and held no bar; though nothing be liable
 but the personal estate of the testator, yet the intent being particu-
 lar, it shall not be construed general, though the words are so.
 Anciently a release of " all demands" released a growing rent, but
 the latter opinions are different, as *Hen v. Hanson*. (m) In debt on a
 bond for performance of covenants; performance generally pleaded;
 replied, breach in non-payment of rent reserved; the defendant
 pleads a release of " all demands;" and held ill: and the reason
 assigned in *Siderfin* (n) is the intent of the parties; for the release,
 being upon an award, intended only to release things in controversy
 submitted; and that a release, and the general words in it, shall be
 restrained and bound up according to the intent of the parties:
 these are the words of that report. And as it is in the S. C. 1 *Keb.*
 511. he said, that the word " demands" being put in company with
 other words, shall be restrained by them; as power to executors
 " to dispose," or " to let and set," gives no power to grant; and
 though the word " dispose" would carry it, yet these general words
 have been restrained ever since LITTLETON's time: this was the
 opinion of WINDHAM Justice, and his words, as that book hath
 them: in all the cases about releases since Charles the first's time,
 I find that case in *Rolls* to be cited, and never denied to be law as I
 can find, in any of them.

• [152]

• [153]

(k) Henley, 9. 15.

(l) Mich. Term, 29 Car. 2. B. R. *Keb.* 814.(m) Hilary Term, 14 & 15 Car. 2. *Roll* 1822. 1 Sid. 141.

(n) 1 Sid. 141.

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v.
COLL.
A release by an
executor of all
actions, suits
and demands
whatsoever, ex-
tends only to
demands in his
own right.
1. Ander. 64.
2. Marth. 119.
3. Keb. 45. 59.
4. Holt, 620.
5. Lev. 274.
6. Cutw. 249.
7. Bac. Abr. 290.
8. Ld. Ray. 235.

SECONDLY, But that which I most insist on is, that this release extends only to demands in his own right, and not as executor. (o) By DYER and MANWOOD (p) upon evidence in debt, if executors grant *omnia bona sua*, the goods which they have as executors do not pass. And so is 10 *Edw. 4. 1. 6. per DANBY. cont.*, if an executor have no goods in his own right; for if they grant such and such a thing in particular, there it will, *ut res magis valeat quam pereat*. I agree, there are some old books to the contrary: but the modern opinion is as I say; and so is *Dorrel v. Colling*. (q) Administrator grants *omnia bona et catalla sua*, a term which he hath as administrator shall not pass, for it is not *suum*, he hath it not in his own right. But if he have a lease in a particular manor or farm as such, and grant all his right in that manor or farm, the term will pass, because he had no other right in it, and his intent was to pass it; but by general words it will not pass. The same reason here, and more so, because this demand he hath not upon his own account, for he is a joint executor. The words are "*ille habuit*" in the singular number, and can therefore be only taken for that which is single, not with the other executors, and this in common parlance and with the *lay gents* is always so understood. In pleading a tenure or seizin of land, it must and will be intended a sole seizin, much more so in grants or releases, where the intent and agreement is to govern the construction: in the case of *Stoakes v. Stoakes*, (r) which Mr. JUSTICE DOLBIN cited in 1669, there is a docquet of it, 2 *Keeble* 530. Debt on a bond, conditioned to pay younger children's portions; the defendant pleads a release of all actions, suits and debts on his own account; and on issue, upon his own account or not, a verdict for the plaintiff; and moved by SIMPSON in arrest of judgment, that it was a *jeofail*, for none can say it was not on his own account being in his name, except in equity; but PER CURIAM the release of that released only what he had the sole disposition of. Much more so here when it is plain that this is no suit which he himself had. And as to the words "any matter or thing whatsoever:" I answer, it is not for any other matter, as it might have been, and that shews the intent to mean no other than this, *viz.* any matter or cause concerning the legacy, as in the case of *Rolls*, "all demands," construed to be as concerning the ten pounds, and there is no difference between covenants and grants as to this particular, of construing by intent.

* [154]

SERJEANT LEVINS *é contra*. A release by one executor is certainly a bar to both; and "demands" is the largest word that can be used: as if an executor release "all actions," it will discharge actions which he hath in his own right, as well as those which he hath as executor, *Cro. Eliz. 164. Gillam's case. Cent. Arnold v. Bridged, Cro. Jac. 518. 318.*

(o) 1 Leon. 263.
(p) Lord Grandison v. Countess of Kent

(q) Cro. Eliz. 6.
(r) 1 Lev. 272. 1 Vent. 55.

. Then

HOLT Chief Justice then declared, that if it had not been in the case of an executor, it would be a bar, because perhaps the consideration of paying the legacy without suit was the having a general release; and we are to favour releases as tending to repose and quiet. But this is not his own suit: a servant may have an action, and that as for *bona sua* taken from his possession; but it is not in his own right. In *Fitzh. Natura Brevium* 79. executor brings not an action as for *bona sua*, if taken in the testator's time, but *quæ fuerunt testatoris*. The case of *Dorrel v. Collins*, in the twenty-fourth year of Queen Elizabeth, and that of *Leonard* when it was doubted, in the nineteenth year of Queen Elizabeth, which was before that in *Croke*, and then all the judges gave their opinion that it was not *his*. "*Quas habuit*," is what he had in his own right, he himself, it must be in his own right, and not as executor, much less as a joint executor. *Sed. adjornat. pro resolutione CUR.*

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v.
COLLINS.
Dyer, 56.
Plowd. 289.
Hedley, 15.
8 Co. 148.
4 Bac. Abr. 263.

Then the last paper day they all *seriatim* delivered their opinions.

EYRES Justice. The release is no bar, because it is plain by the penning of it, that their intent was to release no more than what he had in his own right: for those words "which he had" following the general words, do restrain them to that which he had in his own right. *William Downing* could have no *scire facias* in his own name, for all must join. In 29 *Edw.* 3. pl. 26. in a release, held there that the action being in another's right, there must be special words to release what he hath as executor.

GREGORY Justice. The release is no bar, it appearing upon the whole body of the deed that the original intent was but to release the five pounds legacy, and the acknowledgment of satisfaction is *proinde*; and according to *Dyer* 255. the general words shall be restrained by the particular. Besides, any other construction would work a prejudice to a third person, as the other executors and the testator.

General words
restrained by
the intent.
1 Mod. 99.
Ld. Ray. 235.

* DOLBIN Justice. The words are sufficient to release it, but the intent must guide us. If he had been sole executor, the release only releases the five pounds, because this is not that which he had; according to the case of *Dorrel v. Collins*, *Cro. Eliz.* 6.

* [155]

HOLT Chief Justice. I think the case in *Rolls* no law; it is only cited by TANFEILD; but yet here in this case the general words are not sufficient, for if the particular words had been out, it would not have been a release, for it can release only what he hath in his own right, for "he hath it" and "his own" are all one, and this is not his own. An executor may have trespass for taking goods in his time, *quare bona et catalla sua*, because of the possession. And so may a servant, *Brownl.* 155. But if for trespass in the testator's time, the words are "*quæ fuerunt testatoris*," the goods are not his. If there be any thing to pass without it, then these words shall not pass it. And so PER TOTAM CURIAM. Judgment for the plaintiff.

Case 121.

Bisse against Harcourt.

Hilary Term, 1 Will. and Mary, Roll 217.

If to an "attainder of treason" pleaded in *abatement*, the plaintiff replies "a pardon" and concludes with a demand of damages it is a discontinuance.

S. C. 3 Mod. 281.
S. C. Salk. 177.
S. C. Carth.

137. S. C. 2 Ld. Ray. 1053. Poff. 255. 10 Mod. 112. Salk. 218. Ld. Ray. 338. 1020. 1 Com. Dig. "Abatement" (I. 12.)

INDEBITATUS ASSUMPSIT for four hundred pounds had and received to the plaintiff's use against *Simon Harcourt*. We plead that he was attainted of treason, and so conclude in *abatement*, if we should be compelled to answer him. The plaintiff replies a pardon before the action or cause of action accrued, *viz. ante tempus confessionis assumptionis*. We demur, and pray judgment, if we shall be compelled to answer. They join in demurrer, as if it were a *bar* praying judgment *et damna*. Held *PER CURIAM* to be a discontinuance.

Case 122.

Darrach against Savage.

A bill drawn on a person to pay money for "value received," is a good discharge of a *debt* though the *drawee* do not pay the bill, if the *payer* neglect to demand payment from the *drawee*, and give notice of non-payment to the *drawer* within a *proper time*.

S. C. Holt. 113.
Skin. 410.
1 Salk. 124-442.
Stra. 416. 508.
550.
Andr. 187.
Stra. 910. 1175.
1195. 1248.
2 Will. 353.
3 Mod. 36.
9 Mod. 60.
Kyd on Bills,
121.

• [156]

INDEBITATUS ASSUMPSIT for forty pounds received to the plaintiff's use. *Non assumpsit* pleaded; and, upon the trial, the evidence was a *bill of exchange* or *note* under the defendant's hand dated the 22 of February 1687, directed to a *merchant* in London, "PRAY pay to Mr. Darrach or his order the sum of "forty pounds and place it to my account, value received, witness "my hand." The money was never demanded of the *merchant* till the action brought. Upon the evidence *MY LORD* reserved the point to his own consideration at his chamber.

• Where they insisted, that my client was still chargeable, and that paper was no payment, and that the defendant still continued chargeable till the note was discharged.

I *URGED* for the defendant, that having no other evidence but the words "value received" in the note, the same shewed the parties own agreement to take the *merchant* for his pay-master: that otherwise here would be an apparent injury to us, if he would not demand it in a *convenient time*. That there was above two years and no demand from us, or him of the money.

HOLT Chief Justice held that such a note should be deemed payment, and that the plaintiff was satisfied with the merchant as his debtor, if he did not within *convenient time* resort back to the *drawer* for his money. For his keeping his bill so long in his pocket was an evidence,

dence, that he thought *the merchant* good at that time, and that he agreed to take him as his debtor. (a)

DARRACR
SAYAGE.

And so we had my lord's opinion for the defendant upon deliberation: and by the rule of reference my client had his costs. STACEY Attorney for the defendant.

(a) By 3 and 4 Anne, c. 9. "If any person accept a bill of exchange for or in satisfaction of any former debt, or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt, if such person, accepting of any such bill

"for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest according to the directions of the act, either for non-acceptance or non-payment."

Martin against Sitwell.

Case 123.

INDEBITATUS ASSUMPSIT for five pounds received by the defendant to the plaintiff's use, *Non assumpsit* pleaded.

Upon evidence it appeared that one *Barkdale* had made a policy of assurance upon account for five pounds premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barkdale* had no goods then on board, and so the policy was void, and the money to be returned by the custom of merchants.

An action to recover back the premium as a void policy may be brought by the person in whose name the policy was opened although the premium was paid to the underwriter by the agent who opened the policy.

S. C. Holt. 25.
1 Com. Dig.
134.
Doug. 451.
2 Term Rep.
161.
3 Term Rep.
266.

At the trial I URGED these two points. FIRST, That the action ought to have been brought in *Barkdale's name*, for the money was his, we received it from him, and if the policy had been good it would have been to his advantage; and upon no account could it be said to be received to *Martin's* use, it never being his money. Besides, there may be a great fraud upon all insurers, in this, that an insurer may be in another man's name, and if a loss happen then the insurer shall pay, for that some *cestuy que trust* had goods on board: if the ship arrive, then the nominal trustee shall bring a general *indebitatus* for the premium, as having no goods on board.

* To all which HOLT Chief Justice answered, that the policy being in *Martin's* name, the premium was paid in his name and as his money, and he must bring the action upon a loss, and so upon avoidance of the policy for to recover back the premium. And as to the inconveniences it would be the same whosoever was to bring the action, and therefore the insurers ought with caution to look to that beforehand.

* [157]

Then SECONDLY, I urged that it ought to have been a special action of the case upon the custom of merchants, for this money was once well paid, and then by the custom it is to be returned upon matter happening *ex post facto*. I argued if the first payment were made void, then the law will construe it to be to the plaintiff's use, and so an *indebitatus assumpsit* will lie. But when a special custom

An *indebitatus assumpsit* will lie to recover the premium paid on a void policy of assurance.

Doug. 255.
Cowp. 668.

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appoints a return of the premium, an *indebitatus* lies not, as for money received to the plaintiff's use, but a special action of the case upon that particular custom.

To which HOLT *Chief Justice* answered me with the case adjudged by WADHAM WYNDHAM, of money deposited upon a wager concerning a race, that the party winning the race might bring an *indebitatus* for money received to his use, for now by this subsequent matter it is become as such. And as to our case the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use.

And so judgment was for the plaintiff against my client.

* Trinity Term,

* [158]

The Third of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.*

Sir GILES EYRES, *Knt.*

} *Justices.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Shatter and his Wife *against* Friend.

Case 124.

DECLARATION in *prohibition*, upon surmise that the defendant there sued for a legacy of ten pounds, and the defendant offered proof of its payment by one witness, but was rejected. The defendant to have a *consultation* pleads, that before the *prohibition* sued, there was a sentence. The plaintiff demurs.

Mr. SQUIB argued for the plaintiff, that in their forms of proceedings they shall follow their own course, but not in matters of substance. The end of a prohibition is to preserve the common law. The matter of evidence is the chief and material part of the suit. Testamentary matters were originally of temporal jurisdiction.—

If, in a suit in which the Spiritual Court has jurisdiction, any temporal matter arise, as in a suit for a legacy, and payment be pleaded, and they refuse proof of it by one witness, a prohibition shall go, although after sentence given.

S. C. Post, 172. S. C. 3 Mod. 283. S. C. Comb. 160. S. C. 2 Salk. 547. S. C. Carth. 142. S. C. Holt. 752. 2 Roll Abr. 318. Cro. Eliz. 666. 88. Moor, 907. 3 Mod. 286. 172. 1 Sid. 65. 1 Roll Rep. 12. 2 Roll Rep. 24. 42. 414. Godb. 272. Hob. 188. 247. Litch. 217. Moor, 413. 2 Lev. 64. 1 Ld. Ray. 220. 2 Ld. Ray 1161. 1172. 1211. 2 Salk. 547. 1 Bac. Abr. 619. 1 Burr. 314. 4 Bac. Abr. 261. Comp. 424. 1 Term. Rep. 552. 4 Term Rep. 389.

And

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And here DOLBIN *Justice* interrupted him, and said, That *Hensho's case* (a) was not law; for SELDEN says, no man can shew the contrary when it began. It is in *Lindwood* by the special law and custom of England.—Then he proceeded to cite authorities, which were *Congby's case*, (b) *Bulbrook v. Bridges*, (c) *Keffin's case* (d) *Cecil v. Scott*, (e) *Bellamy v. Alden*, (f) *Longmore v. Churchyard*, (g) *Bagnal v. Stokes*, (h) *Chamberlain v. Nichols*, (i) *cum multis aliis, &c.*

* [159]

I ARGUED *à contra*, that no prohibition ought to go, FIRST, because it is intirely of their consufance. And SECONDLY, because they were come too late after sentence.—FIRST, No man can deny that the original cause is of their consufance; and then the rule in THE REGISTER 58. is full; “*quod non est consonum rationi quod cognitio accessorij in curia christianitatis impediatur, ubi cognitio causæ principalis ad forum illud noscitur pertinere;*” and upon that rule is a consultation framed in THE REGISTER: and where their law and ours differ in the manner of proceeding, and they go according to their own way and contrary * to ours, yet no prohibition, as *Palmer's case*, (k) and *Cootner's case*, there in the same book is the same. And if they proceed contrary to our rule, an appeal lies for that *gravamen*: in *Bridgman's case*, (l) it is taken as a rule, that if the cause be within their jurisdiction, it shall be presumed they proceed according to their law, and then an appeal lies if otherwise: nay, in case of refusal of proof by one witness prohibitions have been denied. I agree there have been many granted, as in the case of *Scott v. Wall*, (m) and *Bagnal v. Stokes*, (n) and many others. But, MY LORD, the reason of the law is clearly on our side, as that it is intirely of their jurisdiction, and never can be tried in the courts temporal. There can be no dashing or crossing of sentences or judgments, and our law always requires two witnesses when the trial is by witness, and never doth admit of one but where the trial is by the jury of the neighbourhood: and for authorities there are abundance for us too, as in 2 *Rolls Abr.* 299. 300. Proof of a will by one witness cited, yet no prohibition, because of their jurisdiction. Then as to this of payment of a legacy; in 4 *Jac.* 1, it was strongly controverted in the case of *Brown v. Wentworth*, (o) and so much as that a declaration was ordered, and a demurrer, and as cited in 2 *Rolls Abr.* 300. it was agreed on the motion, that proof of a testament by one witness refused, was no cause for a prohibition; and the reason was the same as in our case; and no difference can be assigned, as it is in *Yelv.* 92. if offered for a revocation and rejected: there was POPHAM and WILLIAMS *Justices* against the prohibition, and their reasons are very strong

(a) 9 Co. 36. Godolp. 59.

(b) *Hutton*, 22.

(c) 2 *Roll Abr.* 300.

(d) 2 *Roll Rep.* 495.

(e) *Litt. Rep.* 31.

(f) *Latch.* 117.

(g) *Latch.* 217.

(h) *Cro. Eliz.* 88.

(i) *Moor*, 692.

(k) Hilary Term, 14 *Jac.* 1. in the King's Bench, 2 *Roll Abr.* 298.

(l) *Hob.* 12.

(m) *Hob.* 247. See also *Hob.* 188.

(n) *Cro. Eliz.* 88.

(o) *Yelv.* 92.

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because the thing was merely ecclesiastical, and for which the party could have no relief at common law; and the king's courts can no ways be intitled to it, therefore they must go their own way; whereas if it were a thing which might come into the common law courts, there might be crossing of proofs, and to prevent that *prohibitions* have been granted, that the proof or sentence there might be no bias to a jury here; but never where the whole matter was of their conuſance. The *caſe of Roberts*, 12 Co. 65. is plain and full, Mich. 8 Jac. 1. Libel for ſubſtraction of tithes; the defendant offers proof of demife by one witneſs, and rejected; and a *conſultation* upon a deliberate conſideration of all the caſes before that time, and this PER TOTAM CURIAM. And in *Fuller's caſe* there cited by WRAY, and all the judges, it is laid down as a rule, where the original belongs to the eccleſiaſtical court, the determination * of that which depends upon it doth belong to the judges of the ſame court: their proceedings are part of the law of the land, and to be taken notice of and allowed as ſuch, and their juriſdiction is to be preſerved: but the greateſt authority of all, is the opinion of all the judges in the 2 *Inſt.* 608. where they do all under their hands agree, that if the queſtion be upon payment of tythes or legacy, or ſuch like incidents, we are to leave it to the trial of their law, though the party have but one witneſs: but where the matter is not determinable there, but in the court temporal, there lieth a *prohibition*, either upon or without ſuch a ſummiſe. In the caſe of *Warner v. Barret*, *Hesley* 87. it is a queſtion again, and there YELVERTON makes a good diſtinction where it is merely eccleſiaſtical, as for a legacy of a ſum of money, there proof of payment is of the nature of the thing demanded, and conſequently is intirely within their juriſdiction, and they may proceed their own way, for they have juriſdiction of the proof and matter both, and there is no rule there in that caſe of a *plene adminiſtravit* by one witneſs, though the opinion ſeems to be for a prohibition, becauſe the matter of that plea is common law, and then being of common law nature, a common law proof ſhould be received, otherwiſe not; and this ſeems founded on a great deal of reaſon; for otherwiſe no bounds can be ſet, where they ſhall be allowed to proceed according to their own law, and where according to ours. TWISDEN *Juſtice* and ſome others have always held ſtrongly againſt prohibitions in this matter: and he did uſually affirm that ſince the fourth year of Charles the firſt no prohibition was granted, becauſe they reſuſed a ſingle witneſs; for this court hath no conuſance of the matter, and therefore they muſt proceed by their law, and not by ours where the jury are inſtead of witneſſes, and one ſuppoſed to know the fact as being of the vicinage; and teſtimony of witneſſes by our law is no concluſive evidence, but is and ought to be left to the jury. In the caſe of *Tells v. Sir Edw. Powell* a parſon ſues in a court chriſtian for not ſetting out of tithes for double value on the ſtatute 2 Edw. 6. c. 13. The defendant ſummiſed that he ſet them out, and they reſuſed the teſtimony of one witneſs; no prohibition, becauſe they have cognizance. In the caſe of *Prince v. Hewet*, (p)

• [160]

2 Roll Ab. 299.

(p) Mich. Term, 15 Car. 2. Sid. 161.

held

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held that they have been denied ever since JONES's time, and was denied in that case of *Saunderson v. Hawson*, (g) on *plene administravit* offered to be proved by one witness, because it is properly triable before them, and for * the *gravamen* an appeal lies: and in that case of *Mitford v. Emerson*, (r) denied because the principal matter was of their jurisdiction. It is true, that afterwards in the case of *Desbrough v. Richardson*, (s) it was granted, but it was a much different case from ours, as I said before; for that was a complicated plea, and contained matter of common law, and therefore common law proof may be received. But here plea of payment is of the same nature with the demand, and consequently of their own cognizance. Besides, as to the consequence, there can be no distinction or bounds framed, but that this will destroy all their proceedings: for at this rate no allowance can be of any ecclesiastical proof; but in all cases they shall be compellable to receive whatsoever proof a jury doth usually credit, for no subject matter can be more entirely of their cognizance than this: besides, Mr. SQUIB agrees it in the case of a will, and how to distinguish them I cannot imagine.—Then as to THE SECOND POINT; it is after sentence. In *Hob. 79.* in *Sir J. Wait's case* and many others, the rule is express, that for any thing not appearing in the libel; but for matters that are merely suggested that are collateral to the libel, no *prohibition* after a sentence.

Prohibition after sentence.

1 Mod. 64. 81.

2 Ld. Ray. 1408.

1 Ld. Ray. 824.

Cowp. 20. 166.

Dougl. 378.

1 Term Rep.

552.

3 Term Rep.

315.

4 Term Rep.

351.

HOLT Chief Justice. As to the last they come soon enough, for they could not come till they were aggrieved by refusal of proof and that was not known till sentence, as that of citation out of the diocese, that is the first instance, and by a litigating there the party admits their jurisdiction: but here is no such matter. Then for the other, the opinion of all the judges, 1 Jac. seems mighty strong with me.

EYRES Justice. I know of no law in England that allows proof by one witness; for where trial is not by *jury* but *per testes*, there must be two in all cases.

DOLBIN Justice fortiter for the prohibition, that it was an unconscionable unreasonable thing to disallow the proof. And as to that which I insisted on as to the dashing or crossing of sentences and proofs, the Court of Chancery will relieve, and enjoin the party plaintiff not to proceed and why should not we?

Afterwards, in Michaelmas Term, 2 Will. & Mary, THE COURT delivered their opinions *seriatim*. (t)

(g) Trinity Term, 17 Car. 2. 1. Keb. 939.

(r) Easter Term, 19 Car. 2. 2. Keb. 225.

(s) Hilary Term, 27 Car. 2. 2. Roll

Abr. 300.

(t) And the judges were unanimously of opinion that the *prohibition* should go. Post, page 172.

* Ridings against Edwin and another.

Case 125.

Michaelmas Term, 1 Will. and Mary, Roll 30.

* [162]

CASE upon an escape against the sheriffs; declaring on a *plaint* in one of the compters before *H. Edwyn* and a precept to take, *ita quod haberet corpus ad præs. Cur. et sic de Cur. in Cur. quousque placit' terminetur nisi interim inveniet manucaptos*; that the serjeant took him *virtute inde*, and had him in the custody of the defendants then sheriffs of London in the said compter; that they contrary to their duty, let him go at large, &c. Demurrer.

In an action against the sheriffs of London for escape of a prisoner from one of the compters it is not necessary to alledge that "he did not find bail" although the precept directs to have the body, &c. "except he shall find bail."

Chaudflower v. Presley, Yelv. 30.
Powell v. Bradley, Yelv. 36.
Jenkins v. Hancock, 1 Sid. 30.

I ARGUED for the defendant that the breach was ill, not saying that "he did not find bail," for they are to keep in THE COMPTER, just as the serjeant was to keep him, *i. e.* according to the precept. And it is not like the case of a *latitat* here, for there the command of the writ is express and positive "to have the body." In our case it is only conditional; and if not conditional, it is a disjunctive precept, and then it is ill, for then they ought to alledge the negative of both parts, as in covenant. It is true, it may come of our part, but if they have not assigned a good breach of our duty, they have no cause of action upon their declaration. Suppose it were a covenant from a bailiff or gaoler not to let go without order, it would be no good breach to say he did let go contrary to his duty and covenant. So for not to alien without licence, or to enjoy without disturbance; this stands now indifferent in construction, and may have two intendments, and then the rule is to take it most strongly against the plaintiff.

BUT PER CURIAM held well enough, for he was in our custody, and if bailed, it ought to come on our side.

Then I ARGUED that both sheriffs are not liable, but only whose compter it is. I agree a man may be gaoler and judge both, as in the case of *Dunne v Palies*, 2 Rolls Abr. 806. But then it is only in the singular number; and so it seems the case of *Donant v. Ratcliff*, late sheriff of London, Cro. Eliz. 185. and in 2 Leon. 29. case 33. And the reason of the thing seems for it; for as to *latitats* and writs from this court, they are but one sheriff; but there they are several: each sheriff hath his distinct officers, and those of one COMPTER cannot arrest on a plaint in the other, nor can they carry to another COMPTER than that in which the plaint * was. And in their own declaration, it is that he was taken by a minister and officer of Sir H. Edwins one only sheriff: and in the case of *Husband v. Cole*, (a) it was held that the command of the sheriff of

An action on the case lies against both the sheriffs of London for the escape of a prisoner from one of the two compters; although the compters are distinct and each managed by its respective sheriff.

S.C. Carth. 145.
Co. Ent. 436.
Vid. Ent. 15.
1 Roll Abr. 99.
Cro. Eliz. 625.
"Escape." (B. 2.)

Comb. 435. Mod. Caf. 37. 3 Com. Dig. "Escape." (B. 2.)

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(a) 2 Keb. 147.

that

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BOWEN.

that COMPTEER will discharge the serjeants. In the *Countess of Rutland's case*, (b) it is agreed that if one be arrested by a *plaint* in one of THE COMPTERS and carried thither, the sheriff of THE COMPTEER may not carry him to his own house: as to *Minor's case*, (c) against both sheriffs, that is for one escaped out of LUDGATE: In *Herne* (d) it is against the sheriff in the singular number; that in *Rastal* (e) is the City of *Norwich v. Balk*.

It was urged on the other side that all the precedents are against both, they make but one sheriff: in *Brown* (f) is one precedent; but in *Vidian* (g) there is another against both; and divers others said to be so, which are not mentioned in print. *Adjournatur.* (b)

(b) 6 Co. 52. *Moor*, 765.

(c) *Dyer*, 66.

(d) *Herne's Pleader*, 129.

(e) *Rastal's Entries*, 83.

(f) *Brown Modus Intrandi*, pt. 1. p. 49.

(g) *Vidian's Entries*, page 15.

(b) It is said S. C. Caith. 143. to have been held that the action was well brought against both the sheriffs.

Dehers and others against Harriot.

Case 126.

CASE on a bill of exchange: and on the trial a doubt arising, my LORD CHIEF JUSTICE HOLT reserved the consideration of it afterwards at his chamber.—The case was, A. draws a *first* and *second* bill of exchange payable by himself in *Dublin* to B. or order, for value received of him. B. sometime after the said bill was due, negotiates the same with the plaintiff, and endorses it to the said plaintiff by order for value received of him. The plaintiff on the same day endorsed the said bill to D. living in *Dublin* where the bill was payable, which endorsement is as follows, “Pray pay to D. value on my account,” signed by the plaintiff: the first of the said bills is at the same time sent away to D. and in its carriage was lost, and a *third* bill not being to be had, the drawer A. being absent and gone into *Ireland*, lest the second bill should miscarry, as the first did, an exact copy of the second bill is sent to the said D. and demand of payment being thereupon made, the same is refused, because the money was seized by *Tyrcomel*, and a protest is made upon that copy for non-payment, wherein the party that was to pay the bill, gives for his answer, that the monies he designed for the discharge of the said bill were attached in his hands, and therefore he could not pay it, which protest was produced by the plaintiff, together with the said original second bill.

A bill of exchange is made payable to A. who indorses it to B. who indorses it to C. which is protested for non-payment, B. may bring an action on this bill notwithstanding his indorsement.

2 Vent. 308.
Carth. 5.
Skin. 264.

*THE FIRST OBJECTION was, that the plaintiff could not bring the action, because by the indorsement to D. the interest in the said bill was transferred.—I URGED that according to the custom of merchants the indorsement was made for the account of the plaintiff, and D. if he could was to receive the money for the plaintiff as his servant; and we had proved that D. had no interest in the monies. The indorsement restrictively without order, is a material circumstance, amongst merchants, to conclude that the indorsement was intended and made for the account of the plaintiff, and the words “value on my account” do imply it; and by the custom of merchants, the protest for not payment being made returned to the plaintiff (though the bill had been for the account of D.) he the plaintiff being an indorser and possessed of the said original second bill and protest, hath right in his own name to sue and receive the monies from the defendant, and upon payment sufficiently to discharge him; and to this did abundance of merchants subscribe their names and testimony.

* [164]

WHEN the plaintiff went from this to ANOTHER OBJECTION, viz. Whether a protest can be made upon a copy. To which I answered, and twenty merchants attested their customs to be; That in such a case of necessity as this, where a third bill could not be

If a bill of exchange be lost, and a new bill cannot be had from the drawer, a protest may be made on a copy.

Molloy, 281. Beaves Lex Mer. 476. Kyd on Bills, 111, 112. 1 Bl. Rep. 485. 1 Burr. 1516.

had

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HARRIOT.

had from the drawer (a) and one was casually lost in carriage, a protest might be upon the copy, especially where the refusal of payment was not for want of the original bill, but merely for another cause, so that the party who was to pay did not insist on the original bill to be delivered him; and accordingly MY LORD was of that opinion; and we had judgment for the plaintiff.

A bill drawn after sight must be protested on the day it is due; and a bill at sight, on the expiration of the three day's grace.
Molloy, 284.

NOTE. That some merchants said, that if a bill be negotiated by indorsement after the bill was payable, no need of a protest at all. Others, that a protest must be in some convenient time. All agreed, that if there were an acceptance, the protest must be at the day of payment; if at sight, then at the third day of grace; and that a bill negotiated after day of payment was like a bill payable at sight.

If a bill be casually lost, a protest on a copy is good.
Molloy, 281.
Marius, 19.

They all agreed that if a bill were lost, and the drawer might be resorted to for a new bill, then no protest could be upon a copy: but where a bill was lost, and no new one could be had, and the party did not insist to have the original bill, but refused payment for another reason, there such protest made upon a copy for non-payment was good.

In France a bill must be presented in two months.

See the printed case of my clients. It was said by them, * that in *France* if a bill be not presented in two months, the drawer was not answerable, and in *Holland* in so many posts.

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(a) By 9 & 10 Will. 3. c. 17. if any inland bill of exchange is lost or miscarries within the time limited for payment of the same the drawer shall give other bills of

the same tenor and date; security being given to indemnify him if the first bill is found.

Coan against Bowles and others.

Case 127.

ERROR on a judgment in the King's Bench in replevin, where *Coan* complained of the taking of six hogs in a certain field called, &c. The defendants avow as bailiffs of one *J. Kenner, et bene cogn' caption' averior' præd' in quibusdam tribus acris* parcel of a certain copyhold estate of the said *Kenner's*; and because the beasts were there *damage feazant* they take them, &c.—The plaintiff replies, that they were in the said field *vocat, &c.* the copyhold of *H. ABSQUE HOC* that they took them in three acres, &c. Issue joined thereon. On the trial *Coan* is non-suited; the jury assess damages to the avowant to two pence, and costs to forty shillings; and there is judgment that the avowant shall recover *damnum suum præd' ad* forty shillings and two pence, and costs *de incremento* to 10l. 19s. 10d. *Coan* brings error; and assigns for error that one *George Say*, one of the avowants was an infant under age, and appeared by attorney, &c.

I ARGUED for the plaintiff in the error, that judgment ought to be reversed. There are but four sorts of suits in our law; either in proper person, by attorney, by guardian, or by next friend: regularly and generally speaking, the first two are the common ways, and the others are privileges given to infants under age. At the common law all appearances were in proper person (except the case of infants,) whether of plaintiff or defendant, demandant or tenant. An infant never could, nor yet can, sue or be sued in propria persona, and so is the express resolution in the case of *Dawks v. Pieton* in *Stiles* 216. And at the common law no man could make an attorney (much less an infant) but on a writ by the king's prerogative *de attorney faciendo*, and so is *Fitz. N. B. 27*. Until the statute, &c. without such writ, all the entries of appearance both for plaintiff and demandant, defendant and tenant, were in propria persona; now no such writ ever was known for an infant; and the writ supposes the party able to constitute an attorney, and commands the court to receive and admit it: as for an infant there was another provision, as if he sue, then the court to admit and appoint a *prochein amy* or guardian; and if he be sued, then a guardian that should be answerable to the infant; this was generally done by the infant to some able skilful officer of the court that was known for such his qualifications, and so is 2 *Inst.* 261. now by the writs and the statutes coming to enable appearance by attorney in lieu of a personal appearance it would never be thought to extend to an infant, who could never sue in propria persona but only per guardianum. Besides, the reason is plain: an infant is not supposed at discretion able to chuse a fit person *ad respondendum* for himself, no more than he can do any other act of legal validity, &c. He cannot make an attorney, he cannot force the court to allow him one; and in *Fitz. N. B. 27. c.* is a writ to the justices commanding to receive an

In replevin against several if the defendants appear by attorney and avow as bailiffs, and one of them is an infant; yet it is no error; for they all make but one bailiff, and appear in autre droit.

S. C. Antw. 19.
S. C. Carth. 122.
179.
S. C. 4 Mod. 7.
S. C. Salk. 93.
205.
S. C. Comb. 100.
S. C. 12 Mod. 1.
S. C. Holt. 358.
1 Roll Abr. 288.
1 Keb. 940.
Cro. Jac. 289.
303.
Cro. Eliz. 378.
1 Roll Abr. 288.
1 Lev. 299.
Yelv. 58.
1 Mod. 47. 296.
3 Mod. 248.
1 Vent. 102.
2 Saund. 213.
5 Com. Dig.
Pleader.
(2 C. 1.)

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Two avowants,
one as infant
appears by attor-
ney.

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attorney for one defendant, and a guardian for another that was *deins age*: from whence I also infer, that the joining a man of full age with an infant doth not alter the case. By the statute of Westminster the second, cap. 15. 2 *Inst.* 390. "*in omni casu quo minores implacitari possunt; concessum est, quod si hujusmodi minores elongati sunt quominus personaliter sequi possint propinquiore amici admittantur ad sequendum pro eis.*" And my LORD COKE says upon that, "whether essoined or not, he shall sue *per prochein amy*, for essoinment is put in this act to shew what mischief may fall out in this case;" from whence I infer, that where an essoin might be cast by attorney for a person of full age, an infant had no such advantage, and therefore this law was made, which argues that he could make no attorney. I will not argue against an avowant's being *quasi actor*, for I take it to be all one in this case; for where an infant is plaintiff, he shall not sue by attorney; and though he recover, which is to his advantage, and no prejudice accrues by such his appearance, yet it is error; and so is *Bartholomew v. Dighton, Cro. Eliz.* 424: The same in *Reve v. Long, Cro. Jac.* 5. Infant appears by attorney, and held error by all the justices and barons, for that is admitted by all the subsequent questions there how it should be tried; and the justices of the King's Bench too held it error, as is plain by that report, for they only doubted if the Exchequer Chamber could try an error in fact. In *Beecher's case, 8 Co.* 58. it is held to be error, because cannot by law make an attorney, but by reason of some contempt or default is to appear in person, and doth not, as on a *capias* or *exigent*. But here he cannot do so at all: and where he is defendant he cannot appear by attorney, and that is agreed in *King v. Marlborough, Cro. Jac.* 303. in an *ejectione firme*.—OBJECTION. That here the infant was joined with other defendants. But that will not affect this case, and so is that case of *King v. Marlborough, in Cro. Jac.* 303. for there were several defendants, and that reason would make good an appearance by attorney where they are all defendants, which is agreed in *Fewis's case*, cannot be, and the reason is the same in both; for if an infant and another man join in a feoffment and make a letter of attorney, this is not good, nor can it in any sort take away the imperfection of the infant's act: the attorney is made by, or for every one of them: when others are joined the case is the same; for the thing in demand is gained or lost by one who had no warrant. Now an infant cannot be an attorney for another, 1 *Hen.* 5. *pl.* 6. and therefore it is said he cannot appear by attorney: now for a man that cannot make an attorney, there is no reason he should be able as bailiff to avow by attorney, because others are joined with him. Besides, the case of a *feme covert* infant though joined with her husband, who hath power to act for her, yet if by attorney it is error; and so is the YEAR BOOK, 22 *Hen.* 6. *pl.* 31. Baron and feme infant sue for taking away a villain, &c. by attorney, ill. In the 14 *Edw.* 3. "*Age*" 88. *Cessavit* against husband and wife, the husband appeared by attorney, and the wife by guardian; and on a suggestion that she was of full age, the guardian was ordered to bring her into court, and several other cases there are cited in
Holland

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Holland and Jackson's case, Bridg. 73, 74, 75. though the principal case there was not adjudged, because the writ of error abated by death.—The OBJECTION, that it is in another's right, will not alter the case. Though an avowry as bailiff is the title of another, yet in many respects the suit is the parties own, &c. as to costs, &c; it is therefore not like the case of an executor, and yet even there the greater number of authorities, and the reason of the law seems to be, that an infant executor cannot appear by attorney, as 3 *Bulst.* 180. by DODRIDGE and HAUGHTON *Justices* who then were only present. Infant though executor ought to sue by guardian; though in *auter droit*, he still continues an infant; for otherwise he may be *triced* says the book. *Wild v. Rumney*, *Stiles* 318. Infant executor, defendant by attorney, error. And *ROLLS Justice* denied any difference between executor and another, for the same reason, because * infant still. As to the case of *Bade v. Starkey*, *Cro. Eliz.* 541. that an infant sole executor, plaintiff suing by attorney is not error, because in *auter droit*; that is contradicted in *Foxwist's case*, 2 *Saund.* 213. for there it is agreed, that if it were sole executor, it would be no question, and in *Cro. Jac.* 441. it is said that judgment of *Bade* was afterwards reversed. As to the case of *Cotton v. Westcot*, *Cro. Jac.* 420. 441. Infant executor, the defendant pleading by attorney it is error. It is true, there is a difference taken where infant executor is plaintiff, and where defendant. But the reasons there do fail when duly considered; for though by a false plea he may charge himself *de bonis propriis*, so in the other case he may be amerced *pro falso clamore suo*, which he cannot be when he sues by guardian; so that the reason is the same whether plaintiff or defendant. Plaintiff infant may be prejudiced in misconceiving his action in bringing it against an insolvent person, and then a recovery bars him to sue any other of the parties, as in trover or battery. In *Foxwist's case*, *Sid.* 449. (a) it is agreed, that infant executor defendant cannot appear by attorney because of the damage, though as plaintiff it is said he may, because no damage: and in truth that case goes upon distinctions that bear no weight, as it is in *Sanders*, and especially in *Mo. Rep.* 296. TWISDEN opposed it strongly and with reason, for they agree, that if sole plaintiff or defendant executor it is error, and that if all defendants it is error; and agreeing that no sensible difference can be made, for if the joining do alter it, why not when plaintiffs as well as when defendants; if the *auter droit* does it, why not when sole as when joined with others? The damage accruing to the infant is nothing; the question is if he can make an attorney, if it be a legal appearance; and considering that he cannot appear *in propria persona*, that making attorney was never a privilege for him, and the resolutions being as they are, I do humbly conceive it error, and therefore pray that the judgment may be reversed.

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Mr. BALDOCK *à contra*, argued from the difference in the case of *Cotton v. Westcott* and *Foxwist's case*, that all the persons make but

(2) S. C. Ray. 198. 2 *Saund.* 212. 1 *Vent.* 102. 1 *Mod.* 47. 72. 296. 1 *Lev.* 299. 2 *Keb.* 537. 625. 633. 691.

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one executor, and so in avowry they all make but one bailiff; that here the avowant is an *attor*; that he is to have return and a judgment; that the plaintiff in a replevin may plead in abatement of the avowry. (b) But after verdict for the plaintiffs, it is helped by the 21 Jac. c. 1. 13. and that here is a verdict for costs. (c)

- [169] • HOLT *Chief Justice*. If infant sole executor appear by attorney, it is ill, as well as when in his own right; for the infancy is personal, and the disability in his person: *Ruffel's case*, 5 Rep. 27. an infant executor cannot release a debt: if there were two executors perhaps that may make a difference, that one may make an attorney for both, because he may dispose of the whole estate of the testator's.

The next term all the judges *seriatim* delivered their opinions.

EYRES *Justice*. The judgment ought to be affirmed; but I think this is well assignable for error, though it might have been pleaded in abatement; as in *Foxwist's case*, a plaintiff in replevin may plead in abatement, as well as when he makes consuance; but yet it may be assigned for error, as in *Cro. Jac.* 5. 651. 1 *Rolls Abr.* 781, 783. For matters in and before the writ, if not pleaded in *abatement*, no advantage can be taken of it by error (d), but otherwise where it is after the writ, such things may be assigned for error: but here it is no error; the avowants making consuance, as bailiffs, they are in law but as one bailiff: and the disability of the servant shall not prejudice the master: I cannot distinguish from the case of executor, and the rest being joined with them; it is well enough, *Cro. Eliz.* 541. Whether plaintiffs or defendants it makes no material difference; but if it did it would not rule in this case, for according to 7 Co. 23. an *avowry* is in nature of a count; so in the 3 *Inst.* 303. and the bailiffs when they make consuance are plaintiffs and shall have judgment for them, and may sue out judicial writs, and may carry down the cause to trial. (e) But admitting he were really a defendant, I see no reason of difference, it being in *auter droit*; and judgment given for them, it is all one: a bailiff is as much in *auter droit* as an executor. If a replevin be against master and servant, and the servant make consuance as bailiff, and the master plead *non cepit*, the servant shall not have a return, for by his master's plea his consuance is turned into a justification, 2 *Rolls Abr.* 433. And therefore I think judgment to be affirmed.

Bac. Abr. 388.

GREGORY *Justice*. Judgment ought to be affirmed; but yet I think infancy may be assigned for error; but here it is in *auter droit*; he makes consuance as servant to his master: here all the bailiffs make but one bailiff, as in the other case all the defendants make but one executor.

(b) See 4 and 5 Ann. c. 16.

(c) See 2 Ld. Ray. 788. and the case of Stone v. Forlyth, Dougl. 709. notis.

(d) Salk. 2. Comb. 31. 86. 7 Mod.

35. 51. 105. 2 Ld. Ray. 853. Carth.

124.

(e) Vide 48 Edw. 3. pl. 20. Cro. Car.

534.

DOLBIN

* **DOLBIN Justice.** Judgment ought to be affirmed. Infant executor can neither sue nor be sued by attorney, but here they are but one bailiff, and judgment is for them; I think the statute of 21 Jac. 1. c. 13. hath helped it too. It is true, it is not within the words; for there it is thus "Where the plaintiff doth recover by verdict;" now here the avowant is plaintiff, and though there be a non-suit upon full evidence, I think it is within the equity of the statute; the design of the statute was where the cause was tried, I think he is within it, especially where damages and costs are recovered: methinks he is more properly a plaintiff than he that brings the replevin, for he begins the suit by distress, and he has a verdict for damages upon his adversaries non-suit after evidence.

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HOLT Chief Justice. That this is not assignable for error; though I think nothing of its being in right of another and joined with others, for though he does act in the right of another, yet if he do miscarry, damages are to be recovered of his own proper estate, and therefore he is liable to the same damage in this case as in any other: so if infant sole defendant executor, appear by attorney it is ill, if judgment be against him. Infant executor releases without receiving the debt, it is void, *Russell's case*. (f) A miscarriage is as fatal to him and works a devastavit, *Cro. Jac.* 442. He charges himself directly if he misplead; then the joining of others makes no distinction; the complaint is that he and others took the plaintiff's cattle unjustly, now shall the infant suffer by the fault of others? for perhaps the infant was not responsible, and if he had his guardian perhaps he would not join with them, he would insist on some other plea, as *non cepit*. Besides, the case of an executor doth not come nigh this; for there though they be several, they must all join, there is a necessity for them all to join, and therefore one attorney will serve for all, but here it is otherwise; here is no necessity for them to join or to be joined: an infant is compellable to attorn in a *quid juris clamat*, yet he may disavow his attornment when of age: in case of executorship he must join: but yet I think it not assignable for error; for it was a matter which the plaintiffs might have taken exception to, by plea to the avowry: in all cases where a man hath time to take his exception to a particular matter, and lapses his time, and goes to the trial of the cause, he shall never have advantage of that by error; this might have been pleaded in abatement of the avowry, but here he admitting him thus to appear and answer it, admits the consequence to be good and well made: suppose a *feme covert* bring an action as a *feme sole* against a man, and the defendant pleads in bar; he shall never assign this for error: if she make an attorney, this will not be assigned for error. (g) There is against me the case of *Dighton v. Bartholomew* (h), there this error was assigned, but the same book of the case of *Bade v. Starky* (i), is contrary, for there

* [171]

(f) 5 Co. 27. Moore, 146. 1 Leon, 193. 4 Leon, 44. 1 And. 177. Godolph. 104.

(g) Roll. Abr. 781.
(h) Cro. Eliz. 778. 853. 881. Yelv. 2.
(i) Cro. Eliz. 541. Godolph. 106.

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is no difference between an infant in his own right and as executor; the reason of *Starky's case* was, that there was judgment and no advantage taken of it. The case of *Rew v. Long* (k), is also against me, but then the Exchequer Chamber was grasping at errors in fact (but that case has been overthrown since, for no errors in fact are examinable there (l), and this inclined them to hold at that time, that this was assignable for error. They agreed the matter of his own or another's right to be nothing: infancy is a personal privilege, and none shall take advantage of it but he himself. (m) And it seems hard that a stranger shall take advantage of it. Then for me there is 48 *Edw. 3.* Waste against a guardian, and pending the plea he shews that the plaintiff was an infant; and resolved that they could not take notice of it, because he had not taken advantage of it by plea at first: so when there is a man of age appears by guardian, and the other party admits him so to appear, he is thereby concluded, because he hath admitted him so to appear: so is the 17 *Ed. 3. pl. 70.* And therefore judgment must be affirmed.

(k) Cro. Jac. 5.

(l) 3 Salk. 146. Stra. 127. 144. 606.

2 Term Rep. 87. Ld. Ray. 1403.

(m) 3 Mod. 248 3 Bac. Abr. 141.

* Michaelmas Term,

• [172]

The Third of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, *Knt.* Chief Justice.

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.* } Justices.

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt.* Attorney General.

Sir JOHN SOMERS, *Knt.* Solicitor General.

Shatter and his Wife against Friend:

Case 128.

See this Case ante, page 158.

NOW this term THE COURT delivered their opinions *seriatim*.

EYRE Justice. The prohibition is well granted. I admit that where the ecclesiastical court proceeds in a matter merely spiritual though their proceedings be contrary to the common law, yet no prohibition lies. The cases of *Chadron v. Harris* (a), *Brown v. Wentworth* (b), *Robert's case* (c), *Baqual v. Stokes* (d), and 2 *Inst.* 608. go upon the distinction between the surmise of having but

In a suit in the Spiritual Court for a legacy, if the Court refuse proof of payment by one witness, a prohibition shall go, though sentence has been given. S. C. Antr. 158. S. C. 3 Mod. 283. S. C. Holt. 752.

S. C. Comb. 160. S. C. 2 Salk. 547. S. C. Carth. 142.

(a) Noy 12.

(b) 2 Roll. Abr. 300.

(c) 12 Co. 65

(d) Cro. Eliz. 88.

SHATTER
v.
FRIEND.

one witness to prove, and the courts disallowing of one witness. But I think a prohibition ought to go, because they have disallowed the proof by one witness of a temporal matter, but this is only incident to a matter within their jurisdiction. He cited *Hut.* 22. *Hob.* 147. 188. *Moore* 413. 907. *Poph.* 59. 3 *Cro.* 88. 666. *Yelv.* 92. *Cowp.* 424. *Richardson v. Disborough*, 2 *Rolls Abr.* 300. And if the law were otherwise it would be a great inconvenience to executors and administrators; for upon an appeal the party would be remediless; and as to that of after sentence; it was granted after sentence in *Moore* 907. and *Cro. Eliz.* 88. *Bagnal v. Stokes*.

GREGORY *Justice*, for the prohibition. One witness is sufficient to charge him at common law, and if one witness should not be admitted to prove payment, it would be a great inconvenience.

* [173]

* DOLBIN *Justice* for the prohibition, that it ought rather to be after sentence than before, for then it is that it appears that they have disallowed the proof. It is the most rational thing in the world, that a prohibition should go, for this is a mere temporal thing, and then they ought to proceed according to common law: sufficient proof or not is the common case of all mankind that are or shall be executors or administrators.

HOLT *Chief Justice* for the prohibition, and that he doubted it at first, because he thought upon appeal they would themselves have relieved against the disallowance of any such proof, but he found they all insisted on it, that one witness was never allowable though of never so much credit: whereas proof by one witness is sufficient in our law. That this is a temporal matter, and then they ought to go according to our law. If it be for a revocation, one witness is enough, *Yelv.* 12. and the *Co. Lit.* 6. is a particular case; but if there be a trial of a challenge, one witness is enough by our law, and so it is in the case of a summons, *Fitzh. N. B.* 97. 23 or 33 *Hen.* 6. 8. it is *de consuetud' regni*, that they have consufance of these matters, *Linwood* 174. and therefore they must proceed according to our law. In case of tythes; their law requires notice to the parson, but our law requires no such thing. 2 *Rolls Abr.* 302. He also observed that the resolution in 2 *Inst.* 608. of all the judges was Easter Term, 4 Jac. 2. and yet in the very next term, in Trinity, the 4 Jac. 2. the case of *Brown v. Wentworth*, *Yelv.* 92. a prohibition was granted.

And so I think this point is settled though no answer made to the concession of all the judges, only that some of them broke it the next term.

Bachurst *against* Clinkard.

Case 129.

CASE *against* the defendant as sheriff of *Kent*, reciting a judgment at the plaintiff's suit *against* *William Dyke*, for four hundred pounds, and a *feri facias* thereon delivered to the sheriff, that though *Dyke* had divers goods and chattels, yet he had neglected to seize them, and made a false return of *nulla bona*. On not guilty pleaded, on a trial before the LORD CHIEF JUSTICE HOLT, the case was thus. *Dyke*, *Brown*, and others were partners of several sums of great value. *Brown* being indebted, a *feri facias* was sued *against* him, and thereon these goods were all seized, and in the sheriff's custody, and consequently * not liable to the plaintiff's execution: held by HOLT Chief Justice, that being once seized and in custody of law they could not be seized again by the same or another sheriff, and if they were sold thereon, such bargain would be void. Held also, that though they had joint and undivided interests, yet only the share or part of *Brown*, and no more could be seized upon the execution *against* *Brown's* goods, and consequently *Dyke* had goods, and so the return was false, and we had a verdict and judgment for two hundred pounds, being the value of our debt.

NOTE, Both these points were resolved in court the day before by him in his argument, in the case of *Etkins v. Westerne*, and not denied by any of the judges. And I saw CHIEF JUSTICE POLLEXFEN's opinion under his hand upon this occasion, that on execution *against* one partner's goods, only his share or part is liable. (a)

On a *feri facias* *against* one of two or more partners, the sheriff must seize the joint property; but he can only sell the share of him *against* whom the writ issued.

S. C. Holt. 643.
1 Salk. 392.
3 Salk. 61.
Comb. 217.
12 Mod. 446.
2 Ld. Ray. 872.
2 Ch. Caf. 139.
Cowp. 449. 472.
Doug. 650.
Cook B. L. 552.
3 Peer Wms. 25.
2 Vesey 265.
4 Bac. Abr. 460.

* [174]

(a) See *Heyden v. Heyden*, 1 Salk. 392. *Pope v. Haman*, Comb. 217. *Jackey v. Butler*, 2 Ld. Raym. 871. *Edie v. Davison*, Doug. 650, 651. and the case of *Skip*

v. Harwood, in Chancery 1747, cited by LORD MANSFIELD in the case of *Fox v. Hanbury*, 449.

Buxton *against* Home.

Case 130.

DEBT on a judgment. The defendant pleads that he was taken in execution, and voluntarily permitted to escape, and the plaintiff consented to it. (a) The plaintiff replies, that he did not consent, *et hoc petit quod inquiretur per patriam*. The defendant demurs. The plaintiff joins.

facias quare executionem non *against* the prisoner. — S. C. Post. 249. S. C. Holt. 279. Ante, 70. 1 Vent. 169. Carter 212. 2 Jones 21. Lut. 1266. 1 Salk. 271. Barnes 373. 2 Leon 219. 2 Mod. 156. Ld. Ray. 788. 927. 1028. 6 Mod. 78. 2 Salk. 626. 2 Stra. 901. Cal. T. T. 22.

If a sheriff permit a voluntary escape, an action of debt lies *against* him, or the plaintiff may have a *scire*

(a) By 8 & 9 Will. 3. c. 27. If a prisoner in execution in the Marshalsea or Fleet escape by any means, the plaintiff

may retake him by C^a. S^a. or sue out any other execution *against* him, as if never in custody. See also 1 Ann. c. 6.

I did

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I did offer to argue it for the defendant, but having begun and opened the record as before, was stoppt by

DOLBIN *Justice*, that it was a plain settled point; and to that the rest concurred, that *the sheriff* cannot take him again. But against the party plaintiff it is no bar.

And HOLT *Chief Justice* said, an action of *debt* did lie though perhaps not a *scire facias*. *Quære* if any difference between *debt* and *scire facias quoad hoc*.

So THEY ALL gave rule for judgment for the plaintiff without hearing any argument, which was intended as follows.

If a prisoner escape against the will of the sheriff and the plaintiff; either of them may retake: if with the permission of the sheriff, the plaintiff only can retake him.

* [175]

THE PLAINTIFF ought to sue *the sheriff* and not *the party*. The plaintiff is at no loss, for he hath his remedy against the sheriff; the debt is as it were transferred; the sheriff is answerable in debt, and he is now become *debitor ex delicto* (c), and there is no reason why he should have two remedies; and by this error of the sheriff he hath bettered his remedy; he trusted the sheriff with the custody of him; and there * is no reason if he be once discharged why he should be liable without a new contract; this is neither a negligent nor a permissive escape, but a voluntary one. THE BOOKS make a great difference between voluntary and permissive escapes. Suppose he recover in his action against us, yet he may have debt against the sheriff upon the escape, who is answerable; and so is the case of *Offley v. Payne*. (d) In action on the case by the sheriff against the prisoner for an escape, he pleads that the original plaintiff had sued, recovered, and received satisfaction, and that acknowledged upon record. There is both reason and authority for me, and neither against me, as I hope to evince. In the case of *Linacre v. Rhoda*, (e) *Linacre's* body was taken in execution on a statute; the sheriff voluntarily let him at large, and afterwards the consuee sued execution of his land, and an *audita querela* brought by the consuee, and argued strongly that the execution was entire, and all discharged: but resolved PER CURIAM that execution might be sued of lands and goods, but not of his body. And agreed in arguing that case by the counsel of the other side, that if B. be taken in execution, and voluntarily permitted to escape, that B. is fully discharged, though it be by act of the party, for the plaintiff hath had a full execution. In the 14 Hen. 7. 1 Bro. tit. "Escape" 2. in the King's Bench PER OMNES. If a man whose body is in execution escape, the plaintiff hath no remedy but against the gaoler. In Bro. "Novel Cases," 5 Edw. 6. sect. 412. Debt on escape against a sheriff; he pleads that a former sheriff had the party in execution and willingly permitted him to escape, that afterwards he retook him and imprisoned him, and then the defendant was made sheriff, and permitted him to escape; and held a good plea; for being once permitted to escape the second imprisonment was not in execution

(c) 1 Leon 73. Hob. 202. 2 Bac. Abr. 239. 242. 248. 3 Com. Dig. 185.

(d) 1 Leon. 237.

(e) 2 Leon 96. pl. 117.

for the party, and so is *Bro. Escape* 45. In *Ridgeway's case*, 3 Co. 52. Count on an escape; fresh pursuit pleaded; resolved that if he be taken on a fresh pursuit, he shall be in execution for the party though out of his view: but if permitted to escape by consent of the sheriff he shall be for ever discharged, and have the benefit of it. And the reason they give for it is good; because in the first case he shall not take advantage of his own wrong; but here he shall, because of the consent: in the case of *Savage v. Beckham*, *Moore* 597. Escape by the sheriff. The defendant pleads that the gaoler led him *extra ambitum gaolæ et ultra ripas Sabrinæ*. And * held ill, because did not positively and directly say that he voluntarily permitted him to escape, and then the bar had been good. There the sheriff could never retake him, and he could never be in execution for the plaintiff if retaken, and consequently it was a full execution as to his body, and consequently his body is discharged, whereas it is otherwise on a negligent escape. The case of *Mason v. Clayton* (f), is on an escape against the will of the sheriff, and so it is in 1 *Rolls Abr.* 901. The case of *Tremilian v. Roberts* in 1 *Rolls Abr.* 902. is on motion in arrest of judgment, and the reason of that and *Allan's case* is founded on an untrue reason, viz. that the party shall not take advantage of his own wrong, for there the party was guilty of no ill, and no reason the sheriff could not retake him; he did what he lawfully might, and for any thing he knew to the contrary it might be by order of the plaintiff, so that the reason fails here. In *Kelway* 2. It was a doubt if an escape against the will of the gaoler if there could be a new execution; but no question then, but they took it, if with the will of the gaoler it would not. In the case of the sheriff of *Essex* (g), it was held he could never be in execution again, though the party would yield it to him and the plaintiff will allow it, because being let to go abroad voluntarily by the gaoler the execution was utterly discharged, which was according to the case in *Brook*. (h) As to the case of *Ridley v. Mazil* (i), that was *contra voluntat.* of the sheriff. As to the case of *Vintner v. Allen* (k), that was because not said voluntarily, and so is the reason given by the judges in that book. Execution of the body lay not at common law, but is given by the statute as the best and most forcible remedy; the body stands as a satisfaction while the party is alive. When the plaintiff took him in execution he chose this as his best remedy. He could not but foresee that the sheriff might set him at large; it was his own folly to choose an *executio caduca*. The plaintiff is not a perfect stranger to the sheriff, for he hath trusted the sheriff by suing a *capias ad satisfaciendum*. He might have sued another execution. As to the sheriff being a poor man, that is never to be presumed, for the law hath provided otherwise, &c. As to a combination possible; no man surely will combine against himself. As to the sheriff dying, * the party might have died, and so that is all one; *Philips v. Stone*, 2 *Leon* 119. pl. 162. Debt upon an obligation *per vicecom.* Plea that it was given

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v.
HOMER.

See *Saunders v. Ferryman*, ante 70.

* [176]

* [177]

(f) *Cro. Car.* 255.

(g) *Hob.* 262.

(h) See ante, p. 175.

(i) 3 *Kell.* 105.

(k) *Carter* 212.

while

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v.
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while in custody upon retaking after an escape. Held expressly that if escaped with the permission of the gaoler, the execution is entirely gone and extinguished, and the party at whose suit he was taken shall never resort to him that escaped, but shall hold himself to the gaoler for his remedy. But if he escapes of his own wrong, the gaoler may retake him, till the plaintiff hath made his election, whether he will sue him or the party. In the declaration the plaintiff saith that he had no execution on the judgment, which is false.

See 2 Bac. Abr.
240.

See Bonafous v.
Walker,
2 Term Rep.
126.

These short notes I had prepared; and in truth when I demurred I knew not of the judgment in the case of *Alanfon v. Butler* (1), in the time of Charles the Second, which is true law, and settled, that an escape against the will of the sheriff, either plaintiff or sheriff may retake. On escape with consent of the gaoler, the party hath only remedy to take, not the sheriff; if with consent of the plaintiff, then neither plaintiff nor sheriff can retake him, though debt be unsatisfied.

(1) Sid. 330.

Case 131.

Edmonson against Walker:

The Admiralty Court may decree, not only a ship lying in harbour, but also her sails, tackle, and furniture, to be sold for the payment of the mariners wages; but if a person to whom the sails were pledged on land, offer a plea to the libel, claiming property in them, and the Court refuse to receive the plea, a prohibition shall go.

S. C. Carth. 166.
S. C. Holt. 650.
1 Roll. Abr.
529. 531.
Hob. 212.
1 Vent. 174.
308.
2 Brownl. 11.
4 Inft. 154.
Bunb. 121.

2 Saund. 260. 1 Sid. 367. 1 Lev. 243. Dougl. 614. Comp. 424. 2 Term Rep. 649. 4 Term Rep. 382.

• [178]

PROHIBITION. The defendant *Walker* libels in THE ADMIRALTY COURT as executor to her husband *Nehemiah Walker*, late master of the ship *Parlarmitan* ALIAS *Henson*, and the ship and apparel, and hath the same decreed to be sold for payment of the said master and the seamen's wages. Then she by a supplemental libel surmises *Edmonson* to be in possession of certain sails belonging to the said ship, which by the said decree were to be sold, and the said *Edmonson* to have been admonished to render an account of the particulars thereof, and to deliver them to *John Cheek* the marshal of that court, that they might be sold according to the decree. But *Edmonson* hath neither given an account nor delivered the sails, and therefore prayed that he might be attached *donec*, &c. That *Edmonson* did tender an account then of their main sails, two fore-sails, &c. and decreed to be attached until he had delivered them.

The plaintiff suggests the statute of Richard (a) and that the admiralty had nothing to do with land affairs, and that all pleas of trespass, case, &c. were pertaining to the courts of the common law. That one *Taylor* formerly master of * the said ship, and owner of the said sails was indebted to the plaintiff in eighty pounds for the said sails and other sails of him bought at *Stepney*: that being so indebted he did afterwards at the same parish deliver the said sails in the libel mentioned to him as a pledge for the debt aforesaid, to be detained *quousque* the said debt was satisfied. That he was not yet satisfied, that he detained them, viz. at the parish aforesaid.

(a) 13 Rich. 2. c. 5. and 15 Rich. 2. c. 3. See also 2 Hen. 4. c. 11.

Upon

EDMONSON
WALKER.

Upon this suggestion I MOVED for a prohibition, for that the Admiralty had nothing to do therewith, because our possession and detainer was at land; and besides we had property vested in us at land; and if we had none, yet *the tort* which we were guilty of, was at land, and therefore determinable only at common law: the reason why *wreck* is determinable at law, is because it is always cast upon the land. (b) Where part is triable at common law, and part by the admiral law the common law shall be preferred. (c) If a man take a mast floating at sea, and draw it to land claiming admiralty jurisdiction, action lies not against him for this in the admiralty, but at common law, because the *tort* was at land. (d) Owner sends a ship to *the Indies* to merchandize; it commits piracy; and when it returns to *the Thames* the admiralty condemns her: after that the owner takes away the sails and tacklings, and he is sued in the admiralty; a prohibition lies, which is almost our case: for here was a distinct wrong. And as to the case of piracy and sale afterwards at land, there the pirate never had property, and the sale at land was dependant on the taking. Here the proprietor was possessed antecedent to any suit, and the sails not liable till condemnation; for if the ship had been sold at land before such suit a prohibition should have gone, and so it hath been on my motion in the case of *Hoar v. Clement*, Hill. 35 and 36 Car. 2. (e) *Violet v. Plame*. (f) And *Cro. Jac.* 514. is express, that a ship lying at anchor is not within their jurisdiction; and the case of *Meuxin v. Penfutanian* is the same. In the case of *Leigh v. Burling, Owen* 102. master of a ship buys sails and other things, and delivered on board, not within their jurisdiction: if the owner sell her and furniture, and then run away, and then suit is in admiralty for sails delivered a prohibition lies. If tackle be bought at land for ship, and suit in admiralty for it, a prohibition lies. Here the sails are severed, and not part of the ship * when they are on shore. It is but a device to sue for the ship, and then to get the sails as appurtenances: the suit for mariners wages is of their jurisdiction but by sufferance, and so was it held by WYNDHAM, 3 *Keble* 712. It is only by permission for the help of trade; for they may sue at land: here is property claimed and wrong done (if any) at land.

* [179]

HOLT *Chief Justice*. Mariners wages are within their jurisdiction. They may sell the ship, and the sails and tackle are part of it, and remain part of it when they are on shore. The ship itself is at land when in harbour, it is *infra corp' com'*. and therefore that is no cause for a prohibition. And as to the cases of trespass done *infra com'*, it is true they are out of the jurisdiction, but here is only a condemnation of it, as an accessory or appurtenance. And as to the property they will and must allow it, if you come in and plead it, if otherwise we will prohibit them.

(b) 2 Inst. 168.

(c) 2 Co. 79. 4 Inst. 142. and see Capp's case, 2 Roll. Rep. 492. 493.

(d) The Mayor of Harwich's case, 2 Roll. Abz. 533. 2 Dan. Abr. 270. and

Hildebran's case, Hilary Term, 13 Jac. 1. in B. R. 1 Roll. 285.

(e) 2 Show. 338.

(f) 2 Roll. Rep. 49. Moor 891. Cro. Jac. 514.

Then

Prohibition
shall go if an
inferior court
refuse a plea claiming property.

Then I altered my suggestion and alledged an offer of plea claiming property and refusal of the plea, and had a prohibition.

The Admiralty
Court will not
admit a claim of
property until
the property is
brought in.

NOTE, Their course is not to receive a plea unless we bring the fails into court, *i. e.* into the custody of the officer, and then they will admit a claim and contest of property.

And in truth that was the reason of their refusing any plea in our case; but now, affidavit being general, no notice was taken by the other side of that difference of their court.

Case 132.

Clayton *against* Coatsworth.

A declaration
in trespasss that
the defendants
vi et armis broke
and entered a
ship, AND
ALSO took and
carried away
goods, and con-
verted them to
their own use,
AND ALSO af-
faulted and
threatened the
sailors, AND
ALSO detained
the master *per*
quod the ship
could not pro-
ceed on her
voyage by which
he lost the pro-
fits *et alia exar-*
umia, &c. is good
after verdict.

DECLARATION in trespasss for that the defendant together with A. B. on the thirtieth of March, in the second year, &c. *vi et armis* a certain ship belonging to the plaintiff called THE WILLIAM AND DEBORAH, at — then loaded with divers goods of the plaintiffs *fregit et intravit*, and the cabin of the same ship them and there *dirulsit et diripuit, nec non bona et catalla, viz. ducent' librar' plumbi*, &c. did take and carry away, and to their own use did convert and dispose, and also on the mariners of the said ship belonging being the servants of the plaintiff did then make an assault, and to the said mariners *tales minas de vita et imprisonment'*, then and there *imposuit*, and them with injuries, *viz.* assaults and affrays *adsum: et ibidem affecit*, that they could not go their voyage for two days; and one of the said mariners, *viz.* the master did then and there imprison and detain by two days, *per quod* the ship could not proceed in the voyage * for seventeen weeks, *per quod* he lost the profits of his goods, *et al' enormia, &c. contra pacem, &c.*

The defendant pleaded not guilty, and verdict for the plaintiff and forty pounds damages.

* [180]

I MOVED in arrest of judgment, that here was *case* and *trespass* joined; both trespasss *vi et armis*, trover, conversion, and special case all jumbled in one count.

Sed non allocatur PER CURIAM, for that it is only an aggravation, and in the register are abundance of precedents of that nature.

Trespasss for
taking goods,
and threatening
the sailors so as
the ship and
goods could not
go, &c. is not
repugnant.

SECOND EXCEPTION. It is repugnant, because he says we took and carried the goods, &c. and yet threatened the seamen so that the ship and goods could not go, &c. and they cannot be intended different, goods, &c.

ANSWERED that the latter was only an aggravation.

THIRD EXCEPTION. That there was no *venue* laid where the goods were taken away; and this cannot be coupled, for it is as a distinct count. The defendant might have been found guilty of this part and not guilty of the breaking, &c. In the case of *Danett v. Collingden*, Mich. 33 Car. 2. in this court (a) on MR. HOLT's motion in arrest of judgment in trespass for taking *averia querentis*, viz. *unum equum, et unam equam, necnon unum galerum*: held ill, because it lays no property in the hat.

In trespass for breaking and entering at A. AND ALSO taking such goods, the *necnon*, after verdict, couples the *venue* for the breaking, with the charge of taking the goods away.

But PER CURIAM the *necnon* though it did couple them, yet it could not be called in *averia*: but in the present case the *necnon* couples all, and it is but one sentence, so that it is well enough after a verdict, for the *necnon* is copulative, &c.

And so judgment for the plaintiff.

(a) 2 Show. 395.

The King against Bill and others.

Case 133.

Trinity Term, 2 William and Mary, Roll 650.

THE defendants were presented in THE CROWN OFFICE for a *rescue* of a coach and harness, returned upon a *feri facias*, and, upon appearance of the parties, the return was quashed and they discharged, because not good on a *feri facias*.

The sheriff cannot return a *rescous* to a *feri facias*.

2 Roll. Abr. 456. Dyer, 241: 2 Term Rep. 155:

Case 134.

* [181]

* Tamlin *against* Hamlin.

To call another
"a couzening,
"cheating,
"knave, and a
"rogue to
"boot," is not
actionable.

1 Sid. 35. 48.
1 Roll. Abr.
43. 68.
Kit. 143.
Stra. 304.
1 Com. Dig.
189.

CASE for slander. The declaration states that the plaintiff was a good and faithful subject of their majesties, and as such good and faithful subject of their majesties, and of the late king James, &c. from his nativity had been himself free from all faults, and got money and credit by such his behaviour, the defendant to scandalize him, said to his servant, "Your master is a couzening cheating knave, and a rogue to boot, and couzened and cheated all the parish, (*quandam par' de WITHICOMBE innuendo*) and all persons he deals with." By colour of which words he is damaged in his credit, &c. *ad damnum*, &c.

On "not guilty" pleaded, verdict for the plaintiff.

An *infant* must
sue by *guardian*.

5 Com. Dig.
Pleader (2 C. 1.)
(2 E. 1.)
(2 G. 3.)
(2 W. 22.) (3 L. 13.)

I MOVED in arrest of judgment.

FIRST, That upon their own shewing he was an *infant*, for he says as a subject of their majesties, and king James, from his birth, &c. and it is well known when his reign began that he could not be seven years of age, and yet the bill is brought by attorney.

Slander tending
to injure a per-
son in his trade
or office is
actionable.

1 Roll. Abr.
56.
1 Lev. 52.
1 Mod. 19.
5 Mod. 398.
Ray. 169.
Stra. 797.
1 Com. Dig.
190.
4 Term Rep. 366.

SECONDLY, That the words are not actionable being so general, and not laid that he had any office, or was churchwarden, or had any dealings, and no special damage found, or so much as laid. That such words will not bear an action the books are clear; for couzening in private dealing will not bear an action. 4 Co. 16. 2 Bulst. 228. March. pl. 135. Godb. 284. Cro. Jac. 427. Goldsbr. 125. Hob. 76. Owen. 47. 56. Popham 177. Hut. 14. All these books are that *couzening* and *cheating*, unless spoken of an officer, are not actionable.

JUDGMENT staid because not actionable.

Whistler against Aley.

Case 135.

DECLARATION in case, *pro eo quod cum* the defendant in consideration that the plaintiff had paid him three guineas he promised to pay the plaintiff fifty pounds in case the government of Ireland were not surrendered or taken into the hands or power of the prince or princess of Orange (whether they should have their then present or any other title) or to some other person or persons commissioned by them or one of them, or to the use of them or one of them, on or before the 30th day of December then next following: and avers that at the time of making the promise, and always after to the said 30th of December, William Henry and Lady Mary his wife * (now king and queen of England) were prince and princess of Orange, and that the government of Ireland at any time after making of the promise, and before, or upon the said 30th of December, was not surrendered or taken into the hands or power of the prince or princess of Orange, or to any person or persons commissioned by them or either of them, or to their or either of their use; and lays an *indebitus assumpsit* for fifty pounds had to the plaintiff's use.

We pleaded as to the second promise that *non assumpsit modo et forma*, and issue joined thereon. And as to the first, *actio non*, because the government of Ireland was taken into the power of the now king and queen before the said 30th of December, viz. the 29th.

The plaintiff replies that it was not taken, or surrendered; *et hoc petit quod inquiretur per patriam*: and the defendant *similiter*.

On the trial of this issue, we justify for the debt, that by the acceptance of THE CROWN the 13th of February after the wager laid, they were really *et de facto* king and queen of Ireland; that by *Poyning's Act* the same was annexed to, and dependent on the crown of England (a), that the same laws governed both; that being sovereigns of England they were so of Ireland; and though they had not the actual administration of the government there then of the whole, yet of Londonderry, and some little parts there adjacent they had, and did appoint officers thereabouts both civil and military; that if it must be intended of the whole kingdom, then Scotland may as well be said not to be in their hands, because some of the highlands are under those who own not the present authority.

To the first it was answered, that it must be meant the actual administration, and that was not in their hands at that time. That the words "whatsoever title, &c." shew it was the meaning of the parties that it should be the actual administration, and that public notice told every man it was under another administration at that time.

A promise to pay so much if the government of Ireland was not surrendered to the prince of Orange, by that, or any other title, on or before such a day, shall be intended to mean if the actual administration be not surrendered to him; for he was by law intitled to the government before the day; and the words "by that or any other title" shew that the meaning was not the government he then had.

Dalton, c. 46.
2 Vent. 175.
2 Vern. 71.
Ld. Ray. 1035.
6 Mod. 129.
5 Burr. 2802.
Doug. 735.
2 Bac. Abr.
619.
4 Bl. Com. 169.
Cowp. 37. 730.
1 Term Rep.
56.
2 Term Rep.
610. 616.
3 Term Rep.
693.

* [182]

(a) The 6 Geo. 1. c. 5. but see 22 Geo. 3. c. 28. and 23 Geo. 3. c. 55.

WHISTLER
v.
ALLEY.

And of that opinion was HOLT *Chief Justice*; and accordingly there was a general verdict for the plaintiff. But he gave us leave to move the Court next day, and so we did. But ALL THE COURT were of the same opinion with the plaintiff; and accordingly he had his judgment.

* [183]

NOTE, It seemed strange to me, they should countenance such wagers, and permit it to be found by verdict upon record, and judgment accordingly, that the government of *Ireland* was not in their hands. But their opinion seemed to be grounded on * the case of *Grinfall v. Auscher*, 1 Sid. 314. of the bond for payment of fifty pounds after the restoration of King Charles; the judges construed it to be meant King Charles the First, according to the circumstances of things at the time of making the bond. (b)

(b) See also the case of *Andrews v. Herne*, 1 Lev. 33. to the same effect.

Case 136.

Fabian against Plant.

A promise made by a husband after the death of his wife, to pay for goods sold to her while living as a *feme sole trader*, will not support an action; for it is an undertaking for which there is no legal consideration. *Sed quære*; for he is intitled to administration.

Palm. 312.
1 Sid. 337.
Lut. 671.
Cro. Car. 519.
1 Roll. Abr. 351.
3 Mod. 186.

CASE in the Mayor's Court upon an *indebitatus assumpsit* generally for fifty-seven pounds according to the custom of the city. *Non assumpsit* generally pleaded. Upon evidence the debt demanded is for goods sold to the defendant's wife while living, and thereon is a special verdict found to this effect.—THAT the defendant was a freeman and of the company of Hatbandmakers: that *Hannah Plant* deceased, late wife of the defendant, for several years past in a certain house in the liberty of the city *vita ipsius Hannah*, did dwell distinct and apart from the defendant, for which house she paid rent, and in the same house *sola exercuit*, the art of *gimpe lace* making, and the defendant did no manner of way intermeddle in the art aforesaid; and that the plaintiff did sell and deliver divers goods to the said *Hannah* in order to carry on her trade aforesaid, in the whole amounting to fifty-seven pounds, for which the plaintiff now declares: that the defendant for twenty years past hath not exercised any trade, but for all the said time was a minister dissenting from the English church, and to certain persons dissenting from the said church he did often preach: that the said wife of the now defendant did not keep any shop, but for the time aforesaid in her trade aforesaid in *cenaculo domus præd' operabatur*. They further found that the defendant did promise to pay the said fifty-seven pounds to the plaintiff, but that the said promise was made to the plaintiff after the death of the said wife, and not before, *et sic, &c.*

MR. DARNEL argued, that here was a promise which made him chargeable; for that was a consent to her having the goods, and that if he were not liable, the creditors would be wronged. Here is no *feme sole trader*, because it is not in any shop of which notice may be taken, and he did not exercise any other trade. His wife was liable to be imprisoned, and therefore his promise makes him chargeable.

chargeable. At common law, they are but one person, and a delivery of goods to her is to his use. Besides, this is *prima facie* a charge upon him, and the custom only makes it voidable, as in case of infancy. If an executor assume to * pay after six years elapsed, he is chargeable in his own right, though he might have avoided it. So here, though he might have avoided it, yet having promised, he charges himself.

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I ARGUED *à contra*, that a promise without *consideration* is void: that here was none, and therefore this is void. That here was no consideration, because he was not liable. The cases of *Barker v. Fox*, 2 *Saund.* 136. and 1 *Saund.* 210. are both express, that the promise was void, because it did not appear that by the consideration the defendant was chargeable with the debt. (a) It is not found that these goods were for necessities; that they were used in the plaintiff's presence; no cohabitation, but the contrary found, and so the husband not chargeable according to the case of *Minby v. Scott*. (b) But here she is plainly a *feme sole trader*. It need not be in a shop, for some trades are never exercised in shops, as particularly this, and so is *Phillips's Reading* in manuscript in *Mr. Lightfoot's* custody upon this custom, which I have seen. Then for the books, all that I can find, except now and then an assertion that there is a custom in London of a *feme sole trader*, is the case of *Bowett v. Langham*, (c) held by CROKE, HUTTON, and HARVEY, *Justices*, that if the husband intermeddle with the trade of his wife she is not a *feme sole*, but if he relinquish it, or become a bankrupt, or be over sea, or be of another trade, or never intermeddle in it, she is within the custom, these are words of the book. And by RICHARDSON *Chief Justice*, he who sells, ought to take notice at his peril, whether a *feme covert* or *feme sole merchant* by the custom: and so is *Cro. Car.* 68. and it is there agreed, that if the husband at the same time used not the same trade, or meddled therewith, she is a *feme sole merchant*: and in *Lit. Rep.* 31. are the words of the custom as returned on an *habeas corpus* and that is the true measure of knowing it. Where a woman exercises a trade in which the husband intermeddles not, she shall have all advantages and be sued as sole: now here it is found that he intermeddled not; she lived apart, and used the trade alone; the goods were delivered to her for the carrying on that trade, so that it is plain he knew her to be such. This is a privilege a freeman's wife hath, and it is not fit it should be a burthen to him. By the custom of the city she may use a trade alone, so after his death unless she marries a freeman, and then she loses that freedom: these customs are sacred. The promise was not till her death, and then he was not liable: * in any manner of wife. In her life time he was only nameable for conformity, (d) but he was not to put in any bail; neither his own person nor his goods were chargeable, only she: now she is dead. If he had intermeddled at any time during her life or possess himself of

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(a) See also *Poph.* 183. and *March* 208.

(b) 1 *Sid.* 109. to 130. 1 *Lev.* 4. 1 *Mod.* 124. 1 *Bac. Abr.* 296.

(c) *Hetley*, 9. 10.

(d) See *Caudel v. Shaw*, 4 *Term Rep.* 361.

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any of the goods, or the profits of such her trade, he had been chargeable, because that it would have been an intermedling; but now here this consideration was no advantage to the plaintiff, and consequently not good: as to the wrong to creditors, it is at their peril. But no more than in thousands of other cases; and here the plaintiff knew her and her trade: as to *void* and *voidable*, I say it is nothing, because here he was never liable; for as to the executor's case after six years, there was a new promise, but an old consideration continuing, and the statute was pleadable; so of infancy: here was no obligation upon him.—*Adjournatur, &c.*

See 1 Com.
Dig. "Baron
and Feme."
(2. B.)

Afterwards RIDER gave judgment for the defendant, and declared TREBY to be of the same opinion.

Quere, For it deserves consideration, if such a *feme sole trader* acquire an estate and die, and the husband possess himself of it, if he shall not be answerable for her debts.

* Hilary Term,

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The Third of William and Mary,

I N

T H E K I N G ' s B E N C H.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.* } *Justices.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Fowles against Bridges.

Cafe 137.

Michaelmas Term, 2 Will. & Mary, Roll 29th.

SCIRE FACIAS brought by the plaintiff on a judgment recovered by him and *Mr. Nightingale* (since dead) against *Bridges*. The defendant pleads that the plaintiff and *Nightingale* recovered, and the defendant brought a writ of error, which is yet depending. The plaintiff demurs.

I **URGED** for the plaintiff, that the writ was abated because of the death of one of the defendants.

But by *HOLT Chief Justice* it is no abatement if both die, for a *scire facias* may be sued against the executor and they made parties; and so that was overruled (a)

2 Bull. 231. 1 Salk. 319. 3 Mod. 249. 1 Leon. 263. 3 Leon. 68. 5 Com. Dig. Pleader (3. B. 18.)
1 Ld. Ray. 71. 244. 4 Bac. Abr. 42.

(a) By 8 & 9 Will. 3. c. if there be two or more plaintiffs or defendants, and one or more of them shall die, and the cause

of action survives, the action shall not abate, but the death being suggested on the roll, the surviving parties may proceed.

A writ of error does not abate by the death of one of the defendants but a *sci. fa. ad audiendum* shall go to his executors. Cro. Car. 426. Hard. 151. Stile 299. Moor 701. 10 Co. 135. 2. Yelv. 208. 113. Co. Ent. 271.

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v.
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If a *scire facias* be brought on a judgment reciting the suit in *curia nostra* and the writ of error describe it in the time of the preceding king, the record is not thereby removed.

Ante, 145.
1 Roll Abr. 754.
Dyer, 105. 173.
Carth. 158.
1 Sid. 104. 193.
3 Co. 2.
1 Salk. 264.
2 Will. 251.
2 Stra. 1155.
1 Term. Rep. 240.

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Then I URGED that the *scire facias* was of a judgment on a suit *per billam* in *cur. nostra*, and their writ of error was of a judgment in *quadam loquela coram Jac. 2. nuper rege, &c.* that this was a variance which always quashed the writ of error, as in the case of *Dighton v. Greenvil*, (b) this exception moved; and they dare not depend on it, but have brought a new writ of error. So was the case of *Strode v. Osborn*. (c) Error on judgment in the Common Pleas directed to HERBERT of a judgment *coram vobis et sociis vestris*, and the *placita* was *coram* BEDINGFIELD; then after issue there is an entry of BEDINGFIELD's death, and a *succedit* of HERBERT, and held ill, though urged that the proceedings till judgment were *placita*, for that all refers to *placita* at first though in two reigns; here it is *per billam* in *curia nostra*: the books are plain in it, *certiorari* to remove a record in *curia nostra* which was in *cur. predecessoris*, held ill, *Dyer* 206. 1 *Rolls Abr.* 752. are several cases. It is no objection to say, that it may be a *superfedeas* though no record be removed, as in case of a transcript out of *Ireland*. It is not according to *March's Rep.* 10. That is on a particular reason, because of the peril of the seas, and the writ there shall have the same effect as another here. But suppose a writ of error at *Ireland* on another judgment, they may proceed below, because no writ of error in that cause; if judgment be by default, and such writ as this brought, and a reversal, no judgment can here be given upon such reversal, because not the same cause: it is hard to imagine that a writ which can have no effect should be a *superfedeas*. Suppose a writ of error in THE EXCHEQUER CHAMBER on an action here, where it lies not, as in suit by original, appeal of felony, or the like, that could never be a *superfedeas*. It is true, allowance of a writ of error is a *superfedeas*, but it must be in the same cause. Then for their averment of identity, that cannot help it, because made against the record. And for these reasons we had judgment for the plaintiff.

In error in the Exchequer Chamber on a judgment in the King's Bench where a transcript only and not the record itself is removed, the death of either the plaintiff or the defendant in error abates the writ.

Moor, 701. Theol. Dig. Bk. 12. c. 2. Yelv. 208. Bridg. 78. 2 Bull. 231. Holt 1. 640. 296. Salk. 261. 319. 5 Mod. 330. 42 Mod. 150. 1 Ld. Ray. 244. Dougl. 352.

(b) Ante, 36. Carth. 3. 158. 4 Mod. 247. 2 Vent. 321.

(c) Ante, 3. 26. Comb. 113. Holt. 268.

(d) See the same case under the name of *Darcey v. Jackson*, Palm. 123. 149. 224. 1 Roll Rep. 73. 301. Moor, 622. Cro. Eliz. 739. 774. 1 Roll Rep. 85.

(e) S. C. Noy. 126.

made a party. But to me it seems otherwise in case of THE EXCHEQUER CHAMBER, for there according to *March* 72. the record remains here, notwithstanding error in THE EXCHEQUER CHAMBER, otherwise on error here in the Common Pleas. Besides, no record that is removed into this court is ever remanded. The Exchequer hath no record there, but only a *transcript*; there is only an authority as it were by commission between those parties. (f) And so is *Burnet v. Fox*, 2 *Keble* 594. An affidavit of death of one of the defendants in error in the Exchequer Chamber, the court would do nothing in it; but the executors sued a *scire facias*, and had judgment and execution; and so is *Cremer v. Humbston*, 2 *Keble* 467. 520. The defendant in error in the Exchequer dies, a *scire facias* to executors was denied as for a delay; and the difference allowed between this court and the Exchequer; for in one the record is actually removed, and in the * other there is only a commission, and that is between the parties and no others; but in the case of *Bowes v. Pawlet*, *Moore* 701. pl. 974. (g) the defendant in error in the Exchequer Chamber dies after *in nullo est erratum* pleaded, and yet they proceeded to reversal without a new writ *de recordo quod coram nobis*, &c. And in that case, in Hilary Term, 27 Car. 2. in the King's Bench, 3 *Keble* 571. Restitution was granted upon motion on an execution sued after death of the defendant in error, because *per curiam* no abatement, but *scire facias* ought and might have been to executors.

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(f) See *Vicars v. Haydon*, *Cowp.* 843. (g) *S. C. Cro. Eliz.* 653.
2d Dougl. 352. Note (3.)

Kemp against Andrews.

Case 138.

Michaelmas Term, 2 Will. & Mary, Roll 289.

THE plaintiff declares, *pro eo quod* he and one J. N. and J. P. now deceased, whom the plaintiff survived, were in the life time of the said J. N. possessed as of their proper goods and chattels, *viz.* a ship called THE STREIGHTS MERCHANT with its apparel and diverse other goods, to the value of twenty thousand pounds, and being so possessed did lose them, and they came to the defendant's hands by finding, and he in the life time of the said, &c. converted them to his own use.—The defendant *venit et defendit vim et injuria quando*, &c. *actio non, quia dicit quod* the plaintiff *et predicti* J. N. and J. P. long before the times in the declaration, and the said several times, &c. were merchants, and as joint merchants for their common profit were possessed of the said goods, and that by the law of merchants, and the law within the kingdom of England used and approved, there is not or ever was any right of survivorship between joint merchants; that J. N. before the exhibiting of the bills died, and made J. D. his executor, who proved

To an action of *trover* brought by the survivor of three partners in trade, it cannot be pleaded in *bar*, that the two deceased partners and the plaintiff were joint merchants, and that there is not any right of survivorship; for if the executors of such deceased partners ought to join, it is matter of *abatement* and not in *bar*.

S. C. Post. 189. *S. C. 3 Lev.* 290. *S. C. Carth.* 170. *S. C. 3 Salk.* 1. *S. C. 12 Mod.* 3. *S. C. Holt,* 44. *S. C. Ray. Ent.* 507. *Co. Lit.* 181. 199. 2 *Roll Abr.* 87. 1 *Vern.* 217.

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the will, and is yet living; that J. D. died also, and made R. S. his executor, who proved his will, and is yet living, *et hoc paratus est verificare unde petit judicium si action'*, &c.—The plaintiff demurs, and shews for cause, *quod placit' attingit ad general' exit', incert' est et caret forma*.

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I ARGUED that the matter of this plea is ill; that though in point of interest there is no survivorship, yet in point of remedy there is; and all that the books say, is, that the executor of the party deceasing, shall take account against the survivor *per legem mercator'* and so is 3 *Leon. case* 354. 2 *Brownl.* 99. The writ in *the register* 135. *N. B.* 117. is only to charge the survivor with account, *Co. Lit.* 172. And though we are liable to account, yet that doth not take away * our action for the whole, for after a recovery we are still accountable as *receptor' denarior'*, &c. Besides, there is no inconsistency in the law for to have a survivorship in point of remedy. Further, here it may be, because that the executor and the plaintiff cannot join; supposing them tenants in common, yet both should have joined in this personal action, and the action shall survive for the whole, *Lit. sect.* 315. Covenant between three having a joint stock, survivor alone shall have the action, *Eclaston v. Clipsham*, 2 *Keble* 338, 339. (a) *Bro. "Joinder"* 28. 35. But then supposing it ill, yet no advantage is to be taken of it by plea in bar, for we have a cause of action, and this is only to shew us how to bring a better writ, which is only in abatement; it is no more than jointenancy in case of land, or claiming the whole land when our right is only to a moiety, and therefore this matter ought to have been pleaded in abatement, for it is not to the merits of the cause; for in the case of *Hall v. Huffam*, Hilary Term, 18 Car. 2. 3 *Keble* 737. (b) where this is allowed (which is the only case I know of) that was in abatement, and yet on a new action in 3 *Keble* 798. it was said that they and the executors could not join, but the executors should come in upon the recovery of their share.

PER CURIAM, This can never be a good bar, so that we do not consider whether the executors must or can join.

Judgment for the plaintiff. (c)

(a) S. C. 1 Saund. 153. 347.

(b) S. C. 1 Freem. 468. 2 Lev. 188. 728.

(c) S. C. 3 Salk. 1. it is said that the

plea would have been good in abatement. But see Co. Lit. 182. a. *Hall v. Huffam*, 2 Lev. 228. *Smith v. Milward*, 2 Lutw. 1493. *Martin v. Crump*, 2 Salk. 444.

Kemp *against* Andrews.

Case 139.

Michaelmas Term, 2 Will. & Mary, Roll 290.

SPECIALTY, declaring, that the plaintiff and G. N. and J. P. whom the plaintiff survived, in the lives of G. N. and J. P. were *apud MECO in partibus transmarinis*, viz. at *St. Helen's* in *warda de*, &c. possessed of the goods and chattels following, &c. to the value of fifteen thousand pounds, as of their proper goods and chattels, and some goods being at *Meco* aforesaid, being an infidel country in *Africa*, and inhabited by barbarous people, viz. at *London* aforesaid, were directed, ordered and appointed to be loaden and transported in and upon the ship of the plaintiff, and G. N. and J. P. called THE STREIGHTS MERCHANT, *usque et ad port' de London*, and that no other proper or possible means then, or ever after, could be had for the transport of the said goods than in and upon the said ship. That the said ship was then and there ready and fit to receive and transport the said goods according to the appointment aforesaid; that the said goods, by reason of stay there, * were exposed to manifest and undoubted peril of captures and spoliations by the barbarous inhabitants aforesaid; that the defendant knowing the premises and maliciously intending to deprive the said plaintiff and G. N. and J. P. of all means for transporting the said goods and all profits of the same, and the same to expose to the rapines and spoliations aforesaid, did with force and arms take the said ship, and carry her to places unknown, &c. by reason whereof the goods necessarily remained there, and thereby by reason of captures and spoliations aforesaid, the goods were spoiled, damnified and utterly lost *ad damnum* of the plaintiff ten thousand pounds. The same plea as above pleaded; the same demurrer; and the same judgment for the plaintiff.

To a special action on the case brought by the survivor of joint partners on the joint property the defendant may plead in *abatement* the jointenancy and that there is no benefit of survivorship; and therefore the executors of the deceased partners ought to join.

S. C. Ante, 188.
S. C. Ray. Ent. 507.
S. C. Holt. 545.
S. C. 3 Lev. 290.
S. C. Carth. 170.
S. C. 12 Mod. 3.
S. C. 3 Salk. 1.

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The King *against* Tayler.

Case 140.

ERROR on a judgment upon an indictment of perjury in *Bristol*. The indictment is for a perjury before a commissioner for taking affidavits, concludes *contra formam statuti*. and doth not say *voluntariè*, and therefore ill, 3 *Inst.* 167. *Cro Eliz.* 147. 201.— And the indictment is *qui nec*, &c. And for these errors it was reversed.

An indictment for perjury on 5 *Eliz.* c. 9. must state that the offence was *voluntariè* and corruptly committed.

S. C. Skin. 403. S. C. Holt. 543. *Cro. Eliz.* 147. *Hetley*, 12. 2 *Leon.* 211. 214. 3 *Leon.* 230. *Sayl.* 43. 3 *Bac.* Abr. 817. 1 *Hawk. P. C.* ch. 69. f. 17. Cases in Crown Law, 2 edit. 65. 391.

Case 141.

The King *against* Yates.

A person committed at *Hull* for high treason; cannot enter his prayer for trial in the King's Bench; for the 31 Car. 2. c. 21. is to be taken *respectively*.

S. C. Holt. 83. Comb. 6.

Salk. 103.

3 Com. Dig.

470.

3 Com. Dig.

455.

THE defendant was committed to the prison of *Hull*.

I MOVED to have his prayer entered, because it was for treason, that he might be tried, &c.

PER CURIAM. You cannot make a prayer here, because it is to be for the next *affizes* for the place.

I URGED, that it was in the disjunctive, and we might make our prayer either the first day there, or the first week here.

Per HOLT Chief Justice. It must be taken *respectively*, for otherwise all the felons in all the gaols in England must be discharged. For if they are committed just after the *affizes*, and come higher, they must be bailed, if not indicted before the end of the first term; and if not tried the second, must be discharged; and yet they cannot be indicted but in the county where the offence was committed, which can never be thought the intent of that act. (a)

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* I URGED the privilege of this act, the liberty of the subject, the inconveniencies on the other side, that then a secretary of state might send a man to *Hull* or *Canterbury* where *affizes* are rare, and he is certainly a prisoner for a year or two, which spoils the true intent of our law-makers, for then slavery would be as ripe as before the making of the act. Then for the inconvenience objected, that would be remedied by an equitable construction of the clause "where the king's witnesses cannot be ready." But PER CURIAM no relief for my client.

A person committed for treason triable by special commission may be bailed by the King's Bench.

THEN I URGED, that the treason laid to my client's charge was done on the sea, or beyond the sea, *viz.* sending lead to *France*, and that might be tried any where, (b) wheresoever the king pleased. So at last we got him bailed.

See Platt's case, Cases in Crown Law, 144.

A prisoner admitted to bail cannot make

his prayer under the *habeas corpus* act. — Comb. 421. Salk. 103. 12 Mod. 117. Holt. 84.

(a) The *habeas corpus* act, 31 Car. 2. c. 2. s. 7. by which it is enacted, "that if any person who shall be committed for treason or felony plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or the first day of the session of oyer and terminer, or general gaol delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer and general gaol delivery, after

" such commitment, the justices of the said court shall, upon motion in open court, the last day of the term or sessions, set at liberty the prisoner upon bail, unless it appear upon oath, that the witnesses for the king could not be produced the same term or sessions: and if such prisoner upon his prayer, &c. shall not be indicted and tried the second term or session he shall be discharged."

(b) See the statutes 33 Hen. 8. c. 23, and 35 Hen. 8. c. 2.

Barker

Barker against Dormer.

Case 142.

Hilary Term, 1 Will. & Mary, Roll 635, or 505.

THE plaintiff declares in covenant, for} that *William Barker* deceased being seised of certain lands in the county of *Limerick*, in the province of *Munster*, in the kingdom of *Ireland*, made a lease thereof to *Thomas Page*, HABENDUM to him, his executors, administrators, and assigns for thirty-one years, rendering and paying yearly two hundred and fifty pounds in the insurance office in *London*, upon the first day of May every year, by deed indented; wherein the said *Page* for himself, his executors, administrators and assigns, covenants to and with the said *William Barker*, his heirs, and assigns, that he the said *Page*, his executors, administrators, or assigns would well pay during the said term, the said annual rent of two hundred and fifty pounds at the place aforesaid: that *Page* entered and enjoyed: that the said *William Barker* being so seised of the reversion bargained and sold the same to the plaintiff for a year, and afterwards the next day *concessit* the reversion of the reversion aforesaid: that the estate and term of *Page* lawfully came to the defendant, whereby he entered, and hitherto enjoyed the same: that two hundred and fifty pounds was arrear on 1 May 1688, and not paid that day, according to the form of the indenture, *et sic convention infregit ad damnum* three hundred pounds.

* The defendant in *propria persona sua venit et defendit vim et injuria, &c. et dicit quod cur' domini regis et reginæ regno Hibern' conuſance* of the plea aforesaid ought not to have, *quia dicit* that the lands in the declaration mentioned are and always were situate in the kingdom of *Ireland*, out of *England*: that there are, and time out of mind there were in the said kingdom, several courts of record of the king and queen and their predecessors before judges of those courts for the time being for trial and determination of all pleas in all actions, real, personal, and mixed, within that kingdom arising; that all pleas touching the validity and effect of any grants or assignments of any lands lying in *Ireland*, and the rights, &c. are determinable in courts there, and that the cause of action in the declaration specified arose in *Ireland*, ABSQUE HOC that the estate, term, and interest of *Thomas Page* in the premises, came to the defendant at *London*, or elsewhere, out of the kingdom of *Ireland*, *modo et forma*, as by the declaration is supposed; *et hoc paratus est verificare, unde petit jud. si cur' hic placitum prædicti ulterius cognoscere velit aut debeat, &c.*

The plaintiff demurs; and shews for cause, that the traverse is ill, and the plea uncertain, and wants form, The defendant joins, &c.

The assignee of a reversion of lands in *Ireland* cannot maintain an action of covenant in *England* against the assignee of the lessee, although the lease be made in *London* and contain an express covenant by the lessee and his assigns that they shall well and truly pay the rent at such a place in *London*; for the 32 Hen. 8. c. 37. which gives the action of covenant, did not transfer any privity of contract to the assignee so as to make the action transitory; and therefore it can only be brought on the privity of estate which being local can only support an action in the place where the estate lies.

S. C. 3 Mod. 336.
S. C. Salk. 80.
S. C. Carth. 182.
7 Co. 2.
Dyer 40.
Vid. Ent. 177.
Cro. Car. 184.
Jones, 43.
1 Lev. 259.
1 Saund. 238.
Latch. 197.
Hob. 37.
2 Lev. 80.
3 Lev. 295.
Carth. 177.
1 Sid. 266.
Cro. Eliz. 636.

Mod. Ca. 194. 1 Will. 165. 2 Com. Dig. tit. "Covenant" (B. 3.) (c. 3.) 1 Bac. Abr. 34, 35, 1 Will. 185. 3 Will. 25. 4 Mod. 71. 3 Burr. 1271. 6 Mod. 194. 3 Term Rep. 393. 584.

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BARKER
v.
DORMER.

1 Com. Dig. 65.

See 1 Hawk.
P. C. 275.

MY ARGUMENT *for the plaintiff* was to the effect following. The question is, if here be any matter disclosed, to oust this court of its jurisdiction which is ancient and general, and presumed to extend to all personal, real, and mixed actions before MAGNA CHARTA; and ever since to all personal ones by original or bill. To oust this court they must shew that your lordship cannot determine it, and that another can; they must both concur to take away the jurisdiction of this, and give jurisdiction to another, and so is 2 Hen. 7. pl. 17. And that case was observable: the *prior of Huntington* brings a writ on the statute of 5 Rich. 2. c. 7. *ubi ingressus non datur per legem* against diverse men of *Huntington*, supposing their entry into seven acres of land; they plead, that it was held of the bailiffs and commonalty of *Godmanchester*, as of their manor of C. and alledged a corporation in them by prescription, and that the manor is of *ancient demesne* of the king, and pray judgment if the court could hold plea; and held none, because no land was lost, but only damages. SECONDLY, No jurisdiction given to another court. Now if this plea fails in either of these, it is with the plaintiff.

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• FIRST, As to the locality of the action, I conceive there is a great difference between the rule of law, that the law shall draw the trial to it in an action of this nature, and the consequence they would infer, that this court shall be ousted of its jurisdiction of such locality: BUT FIRST, Covenant in its original nature is a transitory action, and so it is reckoned in the statute of Westminster the first, chap. 35. which restrains inferior courts from compelling men to answer before them of contracts, covenants, or trespasses done without their jurisdiction; and so it is deemed by COKE, 2 Inst. 229, 231. where he reckons covenant amongst debt, detinue, and contracts, which are *nullius loci*, and therefore at common law might be alledged in another place than where made or did arise. It is merely personal, and sounds only in damages; the land is not recoverable in it, nor in question any more than a title may be in trespass for taking a tree, or the like. I must agree, that debt (if all here in *England*) against assignee, is local; because it results purely from the *privity of estate*, and arises only from the perception of the profits; but covenant is personal, and doth not so much favour of the realty, as debt; and so it is held in *Kitchin v. Compton*, Trinity Term, 15 Car. 2. Roll 1256. reported in *Sid.* 157. (a) Lease for years, and covenant to repair, which is stronger than ours, the lessor sells the reversion of part to A. and of another part to B. they may join in covenant, though moved that they could not, because in the realty; but overruled here, because *Littleton's Tenures* warrants a rejoinder in a personal action; and such is this. This is not an action upon a covenant in law, but an express one to pay so much money. I must agree that he is obliged at common law because of the estate, but when obliged it is a personal obligation

(a) S. C. under the name of *Kitchin v. Bulkley*, Ray. 80. 1 Lev. 109. 1 Keb. 565; 572.

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and his executors are chargeable with the money if unpaid. It is true, the plaintiff may either distrain or bring debt, and then it favours of the realty; or he may bring covenant upon the express covenant, and then it is a personal transitory action, and follows his person, and may be compared to a personal annuity which is a transitory action, and may be brought in one county, and seisin alledged in another, as is, 21 *Edw.* 4. 33. Suppose his assigns had been party to the indenture, they agree this action lies well here: then in case of an express covenant, upon his acceptance of the estate, the covenant becomes as much his, as if he were party to the indenture; as acceptance of letters patents importing a lease with * provisos in it from the king, the taking of the land makes him liable to an action of covenant even by the assignee of the reversion; according to *Brett v. Cumberland*, *Cro. Jac.* 521. (b) An express covenant imports an express personal contract and agreement between all the parties, and assignees being named, whosoever becomes assignee becomes party thereto, and is bound thereby as much as the person named; and in truth he is named by description as much as can be. An express covenant is always greater in consideration of law than an implied one, for that can restrain, qualify, and controul the other; so that by the former the assignee becomes privy to the contract. It may be objected, that by the statute of 32 Hen. 8. c. 37. it must be agreed that the very privy of the contract between lessor and lessee is transferred to the grantee of the reversion, and so is *Brett v. Chamberland*, and *Thursby v. Plant*, *Sid.* 401. 1 *Saund.* 237. (c) Grantee of a reversion brings covenant in *London* for rent of lands in *Lancashire*; and held to lie, though debt would not; but this is against an assignee of a term, who is bound at common law only by the privy of estate. But I answer, that is not the sole reason of it, for here being an express covenant, and himself named by description, there is a privy of contract created between them, for he is as liable as the lessee, and when he is named he is not a perfect stranger to the contract; and they cannot shew any case where covenant was held local when against an assignee, because he is become *quasi* a party: debt and covenant by implication are held so in abundance of cases, as *Cudmore v. Board*, *Cro. Car.* 183. is debt, *Stacy v. Bretton*, *Cro. Jac.* 446. that was because contradictory in saying *permisit apud LONDON' præd. dom' in SURREY fore in decasu*. NOTE, lessor hath election to go either against lessee or assignee on express covenant, *Batchelor v. Gage*, *Jones* 223. *Cro. Car.* 188. *Norton v. Ackland*, *Cro. Car.* 508. and the first execution shall be a bar, and the last may have an *audita querela* thereupon. Assignee when named is not obliged purely for the sake of the privy of estate, *Isted's case*, 1 *Ander. pl.* 148. Covenant to renew or make a new lease within or at the end of a term is held to lie by an assignee of a term against the grantee of the

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(b) S. C. Poph. 136. See also 3 Bull. 163. Godb. 276. 1 Roll Rep. 359. (c) S. C. 1 Lev. 259. 1 Vent. 10. 2 Keb. 439. 448. 492. Dougl. 187.
2 Roll Rep. 63. Dougl. 187. (d) See *Palmer v. Edwards*, Dougl. 187, 188.

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reversion (*d*); it is true there is judgment on another point, *viz.* a fault in the declaration; but ANDERSON * says, that DYER and the rest of the judges were of that opinion. Now if assignee named were not party to such contract, no such action could lie, for that the privity of the estate was determined by the determination of the lease, and that is apparent, in that no distress can be a day after the term; a *nomine pœnæ* is a personal forfeiture, and yet an assignee is chargeable with it: and so is *Thyn v. Chomley*, *Moore* 557. *Cro. Eliz.* 383. (*e*); though it is true, it must be a covenant that runs with the land, yet it shews that his taking the land makes him bound by all the express covenants covenanting it. So assignee of a term shall have advantage of a covenant for further assurance. *Bailey v. Hughes*, *Cro. Car.* 137. (*f*) So it lies against him for not leaving the premises repaired *ad finem termini*, though the term be ended before a breach can be, *Matures v. Westwood*, *Cro. Eliz.* 300. (*g*) A covenant to build *de novo* will charge an assignee if named, as *Cockson v. Cock*, *Cro. Jac.* 125. Assignee of a term shall have advantage of a covenant to withhold rent, on being charged with issues, *Bayley v. Hughes*, *Cro. Car.* 137. Then suppose him not obliged but only *ratione tenuræ*, yet the payment is to be in another place, and the land not coming in question but only indirectly, the trial shall be where the writ is brought and the fact alledged; and of this opinion was FINCHDEN Justice in the year book, 43 *Edw.* 3. *pl.* 2; in Assize of rent, the issue is whether the charge were by deed or not; the assize shall not be adjourned, but tried where the writ is brought. The land here can come in question only indirectly; and if upon the pleading issue be on *non concessit*, or *non dimisit* of a thing that passes by deed, the trial shall be where the grant or demise is alledged; otherwise of a lease for life or feoffment; and so is *Sir John Karne v. Prythur*, *Cro. Jac.* 375. (*b*): and perhaps such issue may be never joined, and then it is no objection. Covenant is *quasi a tort*; it is *fractio conventionis*, and in all *torts* the actions shall be brought where the wrong began; and so is *Dyer* 40. Here the first default is non-payment in *London*. Further as to the locality, supposing it local, yet that will never take away the jurisdiction of this court; for if by any means such proceedings may be in this case as that this court may determine the whole, then this court hath jurisdiction; now the former is proved by the case of *Smith v. Batten*, *Noy* 142. and *Cro. Jac.* 142. Covenant in *London*; breach in not repairing lands in *Hertfordshire*, and judgment for the plaintiff *per nihil dicit*; writ of enquiry of damages shall be awarded to * *London*, though the thing in which the breach was assigned was merely local, because damages only are to be recovered. This I urge, to shew that there may be nothing wanting at the trial in *Ireland* in this case. IT IS OBJECTED, There can be no trial, because the cause of action accrued *ultra mare*. To answer

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(*d*) See *Palmer v. Edwards*, *Dougl.* 187, 288.

(*e*) S. C. *Goldsb.* 129. 186.

(*f*) See S. C. under the name of *Bailey*

v. Offerd, 2 *Danv. Abr.* 236. 1 *Jones*, 244.

(*g*) S. C. *Moor* 527. *Gouldsb.* 175.

(*b*) S. C. *Jenk.* 312. 338.

that,

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that, I agree that if all the matter did arise *ultra mare*, both agreement and performance, no action can lie here for want of a trial; but if either part here, trial shall be here by the common law; and so is *Dowdale's case* expresses, 6 Co. 47. and Co. Lit. 261. as on charter parties or obligations made and dated beyond sea, if to be performed here shall be tried here (i); *et sic vice versa*. Suppose it were a covenant made and dated in *Ireland*, that would be as local as this can be pretended, yet if it were to be performed here, it would be triable here. The admiralty jurisdiction is as much allowed by our law as the courts in *Ireland*, if they keep within their jurisdiction; yet the common law courts shall try all such matters; as if performance was, or was to be upon land, as charter parties and the like. A jury here may take notice of, and find assets, and administer in *Ireland*; and so is *Dowdale's case*, which was, debt against executor, and that matter found upon special verdict, and judgment for the plaintiff. They may find a warranty and assets in another county. On the general issue they are bound to find all local things in another county that are material, so no inconvenience in this jurisdiction. A jury here may find administration in *Ireland*, *Godbolt* 33. Rather than there should be a failure of justice in *England* a trial shall be here of things local in their own nature; as adherence to the king's enemies beyond sea, upon 25 *Edw.* 3. c. 2. 3. Co. Lit. 261. and 19 *Edw.* 4. pl. 6. Here may be a failure of justice. Suppose the term expired, the assignee having no concerns in *Ireland* comes hither, what can such lessor do? to sue there he cannot: suppose then *Ireland* is entirely beyond sea and an independent separate kingdom, as the books say it is, *Calvin's case*, 7 Co. 22. and several authorities there cited for it, that *Irishmen* are the same with the inhabitants of *Calice* and *Gascoigne*, and that a voyage royal may be made into *Ireland*, which shews it a distinct dominion; and, by COKE, MAGNA CHARTA extended not to *Ireland*, (k) or any of the foreign dominions; but by *Poyning's law* in 11 *Hen.* 7. it is made to do so, and if so then their giving jurisdiction to courts there is not sufficient to oust this court * of their jurisdiction in a cause which they can determine. *Ireland* is beyond sea, as to the statute of limitations, and your lordship hath ruled it so. (l) Either it is a divided kingdom, or else it is a franchise, and then it may be tried there by a *mittimus*, or else upon an equitable construction of the statute of 9 *Edw.* 3. c. 4. by the next adjoining county, as hath been done in some cases, I will cite presently. If either way, there is no colour for this court to deny itself the jurisdiction of this cause, for here is a jurisdiction attached; if the matter be triable and determinable by any means of this court, the defendant is here, he is in *custodia maris*^c; we have declared against him by bill, and not by original. It is no argument that this court shall not have jurisdiction, because the land shall draw the trial after it upon some issues, for it will not do so upon all: here was the payment to be made in *London*; and that cannot be tried in *Ireland*, but by a

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(i) 1 Bro. Abr. 77. 2 Bro. Abr. 215.

(k) 2 Inst. 5.

(l) In the case of *Nightingale v. Adams*, ante, page 91.

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fictional *venue*, and by the same reason may the lease and assignment be tried here; for *non concessit* is no more a local issue, than payment, or non-payment. By FORTESCUE in 32 Hen. 6. pl. 25. If a release dated in *Ireland* or *Wales*, or other local matter be pleaded, it shall be tried where the writ is brought; if a franchise, the parol may be sent by *mittimus* to be tried there. And so is that book. Bro. "Jur." 104. SHARDE said he had seen a precedent of a *feme* compelled to answer here for an entry into lands in *Ireland*. *Holding v. Keeling*, 3 Keble 150. Debt for rent out of lands in *Ireland*. The defendant pleads a seisin in fee by the then duke of York, and an entry by him, and eviction; the plaintiff replies not seised in fee, *et hoc petit quod inquiretur per patriam*; the defendant demurs, because supposed not to be triable; judgment for the plaintiff: and KEBLE says, That HALES was of opinion the trial must be in *Ireland*, and the rest thought it might be tried here; but all were of opinion that this court had a means of trying it, and so gave judgment for the plaintiff. Bond with condition for payment of money at *Dublin*, there pleaded, and judgment for the plaintiff, because it ought to have been pleaded with a *venue* here; *Goodier v. Gardner*, Trinity Term, 1 Jac. 1. Roll 3292. cited. 2 Keb. 397. in *Jackson v. Crispe*, about *Berwick*, and held in 2 Keble 391. that covenant to settle land in *Berwick*, or *Barbadoes* may be tried here; and if so, the same reason for it *vice versa*; and in that cause the trial by the next county, viz. "*York*," was held good, 1 Sid. 462. In * case of necessity the trial shall be at common law by the next county, as indictments of a county for not repairing a bridge, or the like, as in the case of *York*, 2 Rolls Abr. 579. In the same title are several cases of trials of matters arising in the *cinque ports* by juries out of the neighbouring villages, as in *Elpin v. Hutton*, trespass for an assault justified by service of a *subpœna* in the *cinque ports*, *de injur' sua propria* replied; tried by the next vill. So upon an appeal of murder committed in *Feverham*, *Watts v. Brayne*, Cro. Eliz. 694. And in the same abridgment is the case of *Barnwell v. Rochford*. (m) Error on a judgment in an assize in the King's Bench in *Ireland*; the defendant pleads, that the plaintiff had made a feoffment to J. L.; issue is joined thereon, and thereon the defendant says that *Salop* is the next county, and tried there, and a verdict for the defendant in writ of error. In 2 Rolls Abr. 571. Obligation to pay money at *Dublin*, triable here. Whensoever part is here, and part there, it is triable here; and whatsoever is triable here by any means they cannot plead it out of the jurisdiction of this court, because the jurisdiction of this court is general; and though in respect of counties in *England* the land will draw the cause, yet it does not follow that it will so do in case of another nation. If *Ireland* be out of the realm and in another kingdom, then according to *Dowdale's case*, (n) and the case 7 Co. 9. part being here, the king's courts have jurisdiction. If *Ireland* be within the jurisdiction of the kingdom of *England*,

(m) Hilary Term, 36 Hen. 8. pl. 35. in B. R. 2 Roll Abr. 597.

(n) 6 Co. 47.

then the court may have jurisdiction, for the cause shall be tried either where the writ is brought or by *mittimus*, or next county. To me it matters nothing which; still this Court hath jurisdiction.

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As to *Shaw v. Straughton*, 3 Keb. 163. there is no judgment (o); however, that reaches not our case; it is only a recovery there bars here; and so this court will take notice of judicial proceedings in the courts and methods of foreign kingdoms. Dougl. 554. Park. on Jus. 359. 362, 363, 364.

SECONDLY, Then for the traverse; that is ill. It is true, generally speaking, in all places to the jurisdiction, there ought to be a traverse that the cause of action arose within the jurisdiction; but, FIRST, Here is only the supposal of the Court traversed. SECONDLY, It is not material at all, for whether the assignments were here or there, it matters not; for if the action be local by reason of assignees being liable upon this privity of estate, it is nothing to the purpose that the assignment was in one * place or another, for still the action must be local, and therefore this traverse is ill. For if we take issue, and it be found for us, it will do us no good, for the law is the same be the assignment in one place or another. Upon those notes I argued for the plaintiff, that this Court hath jurisdiction of this cause.

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TREMAINE *Serjeant* argued, for the defendant, from the cases, that *debt* against an assignee was local; but could shew no case where there was any judgment upon *covenant* on an express covenant naming assignees.

HOLT *Chief Justice*. The naming or not naming assignees will not alter the case, for the assignee is bound only at common law: it is true, that the *privity of contract* between grantor of reversion and the lessee is assigned to the grantee, by the statute of 32 Hen. 8. c. 37. but the assignee of the lessee remains as he was at common law. However, let us hear another argument. (p)

(o) 2. C. 2 Lev. 86.

(p) THE COURT, after another argument, was of opinion, that the rent being made payable in *London*, did not alter the nature of the case; for this being a *local covenant* which adheres to the land, and on which the lessor himself could not have maintained an action in *England*, the statute 32 Hen. 8. c. 37. transfers it to the assignee in the same plight that the lessor had it, 2. C. 1 Salk. 81. "There is a difference," it was said, "between an action of *DEBT* for rent brought by an assignee, and an action of *COVENANT*; for the first is an action at the common law, which hath fixed the rent to the reversion, and therefore such action must be maintained upon the *privity of estate*, which is always

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local (1 Will. 165.) But an assignee of a reversion could not bring an action of *covenant* at the common law; for it is given him by a particular statute, the 32 Hen. 8. c. 37. which did not transfer any *privity of contract* to the assignee; but the intent of it was to annex to the reversion such covenants only as concerned the land itself, as to repair the house, or amend the fences (sed vide Cro. Jac. 142.) and not to annex or transfer any *collateral covenants*, as to pay a sum of money; for that is fixed by the common law to the reversion. At the common law, it is true, an assignee of a reversion might have maintained an action of *covenant*, for any thing agreed to be done upon the land itself; but *privity of contract* is not thereby transferred so as to make

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the action *transitory*, but it must be brought upon the *privy of estate*; for on a mere covenant to do a *collateral* thing not in the demise, though the word "assigns" is in the deed, yet they are not bound if they have no estate (5 Co. 18. a.); so that it is not the naming of them, but by reason of the *estate* in the land that they are made chargeable," S. C. 3 Mod. 238.—THE COURT therefore inclined against the plaintiff, S. C. Carth. 183; and held, that the plea was good, S. C. 1 Salk. 80; but

no judgment is entered on the roll, S. C. 3 Mod. 238.—But in the case of Way v. Yalley, 6 Mod. 194. this case is cited and said by HOLY Chief Justice to be *good law*; for the action being brought against the *assignee*, it is grounded upon the *privy of estate*, which is LOCAL, and therefore ought to be brought where the land lies. See also 1 Saund. 238. Hob. 37. 3 Lev. 154. 1 Bac. Abr. 34, 35. Dougl. 189. 3 Term Rep. 393.

* Easter Term,

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The Third of William and Mary,

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THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Bennet against Gaudey.

Case 143.

EJECTMENT of a messuage in Cornhill on the demise of *Sir John Mordant, Shem Bridges, and Thomas Lawfield*. On not guilty pleaded, and trial before *Chief Justice HOLT*, a special verdict is found.

THAT *Edward Blackwell* late alderman of *London* in his lifetime was a trader, and did exercise the trade of a goldsmith within the city of *London*, seeking his living thereby by buying and selling, and thereby became indebted in divers great sums, and became a bankrupt within the statute for that purpose. That, being a bankrupt, he was afterwards seised of the premises in fee-simple. That afterwards, 16 April, 35 Car. 2. at the petition of the creditors of the said *Edward*, a certain commission under THE GREAT SEAL was made and directed to D. K. and W. B. Arm^s, W. F. J. C. and

If a commission of bankrupt take effect, and all the creditors who appear and prove their debts are satisfied, the Lord Chancellor, on the petition of the creditors, may grant a *super-judicial*.

S. C. Carth. 178.
2 Ch. Cal. 144.
191.
1 Vern. 208.
1 Atk. 133. 145

154. 193. 218. 1 Com. Dig. "Bankrupt" (D. 41.) 2 Post Writ. 545. 1 Cook's Bank. Laws 548.

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See 5 Geo. 2.
c. 30. s. 45.

See Cooke's
Ban. Laws 129.

J. B. Gent', reciting, that *Edward Blackwell* had become a bankrupt above a year then past, and thereby designed to injure divers creditors therein named, orders them to proceed to the distribution of his estate, &c. That the commissioners therein named 17 April the same year did meet and deal in the said commission, according to the tenor thereof. That 4 June, 35 Car. 2. a writ of *superfedeas* issued directed to the commissioners, reciting an information that he was a bankrupt, and a commission thereon, and a petition of divers creditors (but not all the same) to SIR FRANCIS NORTH Keeper, for to have it *superfeded*, who doth command the commissioners to stay all further proceedings, and that they *superfede* the same. That 9 June 1683, *Edward Blackwell* dies. That * 3 September, 3 Jac. 2. another commission issued directed to E. F. W. B. C. M. W. F. J. J. J. D. and J. M. reciting the first commission, and that it had been dealt in, and a deed of assignment of some part of *Blackwell's* estate sealed and delivered, and carried into the inrolment office and there left, and a petition to LORD JEFFERIES, that a *superfedeas* had been unduly obtained, and the said deed of assignment withdrawn out of the inrolment office, and that it was ordered by the said Lord Chancellor, that the order for the *superfedeas*, and the said *superfedeas* should be *superfeded* and discharged, and that the commission being abated by the demise of Charles the Second be renewed, and that E. F. be instead of J. K. and J. M. added, and that the granting it did thereby discharge the *superfedeas* and the order for it, and ordains those seven to be commissioners of and for the said bankrupt's estate. That 3 September, 3 Jac. 2. another precept called a *superfedeas* issued, directed to W. K. W. F. J. C. and I. F. and all other persons, reciting all the premises, did discharge and *superfede* the said *superfedeas* as unduly obtained, and to the wrong of the creditors. They find another commission 9 November, 1 Will. & Mary, directed to E. H. J. C. T. G. F. H. M. H. J. G. S. A. and W. reciting the bankruptcy and several commissions, and a petition to the now keeper, praying a renewal thereof, and that they hearing all on both sides, did order and appoint *Ed. H.* and others to be commissioners of and for that estate, &c. That an assignment was made 7 January 1689, by the commissioners to the lessors of the plaintiff, and in due manner executed. That the said indenture was inrolled 23 January, 1 Will. & Mary. Then they find 1 Jac. 1. c. 15. s. 17. for exposition of the statute of 13 Eliz. c. 7. "that after any commission of bankrupts hereafter sued forth and dealt in by the commissioners, if the bankrupt happen to die before the commissioners shall distribute the goods, lands, and debts, that then nevertheless the said commissioners shall and may in that case proceed in execution in and upon the said commission for and concerning the bankrupt's estate in such sort as they might have done if the party were living." That the lessors of the plaintiff after the making of the indentures entered and were possessed *prout lex postulat*, and made the lease to the plaintiff. That he entered and was possessed, and the defendant entered upon him. *Si pro quer' tunc, &c.*

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* I ARGUED *for the plaintiff*, First, As to the *superfedeas*,
 1. I say it is void and illegal, for that no such thing could be by
 law. The commission in this case is not barely a power or au-
 thority from the crown, for the general government of the realm,
 but the creditors have an interest in that authority; every creditor
 hath an interest, though some only prosecute the commission; for
 every one may come in before distribution: it is a thing grantable
 to the creditors of a bankrupt trader *ex debito justitiæ*, and cannot
 be denied by the keeper of the great seal any more than a remedial
 writ to the party injured. It is not the same with the custody of
 lunaticks or ideots; for there the king or the administrator shall
 have the profits *ultra*, &c. Here the king hath no interest but
 when, and as a creditor; and then there is care taken for him by
 expresse provisos in those statutes. Till satisfaction the creditors
 have a right: it is procured at their charge; and if it may be su-
 perfeded without their consent, then these statutes put them on a
 snare, and inflame their debts, and no certainty of having the bank-
 rupt's estate assigned to them or their use; so that this *superfedeas*
 works a plain wrong to the creditors. And the consent of some
 cannot bind the rest, for the design of the statute was to make equal
 satisfaction to all. Now by this means some may have their debts
 paid to procure their assent, and consequently all the others may be
 cheated, which is contrary to the expresse design of all these laws.
 The commissioners authority is for the interest and benefit of each
 individual creditor by simple contract as well as by judgments, for
 small sums as well as great ones. Suppose a seizure, and no distri-
 bution, shall the *superfedeas* rob these creditors: the bankrupt can-
 not have it again, for he is only to have that which is surplus after
 satisfaction: the creditors they need an assignment: then what must
 be the consequence? Here is a trading debtor becomes a bankrupt,
 and found so upon a commission, and the estate is seized, and then
 a *superfedeas* before satisfaction. Suppose a partial satisfaction by a
 distribution of the then estate of the bankrupt, yet even then a *su-
 perfedeas* would do a wrong, for if lands descend afterwards, they
 may most undoubtedly be sold. These * acts of parliament are for
 the advancement of trade; and so according to the rule in our books
 are to be construed in favour thereof: they are remedial laws, and
 therefore also are to be so construed. Besides, there is an expresse
 proviso in the statute that they shall be intended in favour of the
 creditors, and that ought to extend to the award of commissioners,
 as well as to the other clauses. Here being the interest of a sub-
 ject concerned, the king cannot dispense with such a law, and a *su-
 perfedeas* is tantamount to it. The king cannot prohibit a suit here,
 before your lordship; a *rege inconsulto* lies not, but where he is af-
 fected in consequence and interest, and so is the case of *Blofield v.
 Haver*, 1 And. 281. pl. 289. Where a failure of justice ensues,
 the king's prerogative is limited, so that it shall not occasion it, as
 many cases prove; as if he grant exemption from service of juries,
 it is void if there be not sufficient besides: he cannot grant exemp-
 tions from the admiral's jurisdiction in a certain place, unless he
 grant to some in that place the like jurisdiction, for fear of a failure

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of justice, *Hudson's case*, 2 *Rolls Abr.* 201. Here is plainly a failure of justice if the *superfedeas* were legal and good; for the creditors not consenting could never have right, the estate seized and the bankrupt dead: he that is a bankrupt to one creditor is a bankrupt to all, *Stiles Reg.* 48 once a bankrupt and ever a bankrupt, *Glyde v. Bludworth*, 1 *Sid.* Such *superfedeas* was never granted before, and according to LITTLETON's rule, that is a good argument against its legality. Besides, SECONDLY, This *superfedeas* doth not discharge or annul the commission, but only commands the commissioners to forbear and surcease all further proceeding. Then it is no more than a commission dealt in, and the commissioners stopt, the party dies; then a demise of the king; then a new commission, and there is now no such *superfedeas*, for that it is vacated and rendered as null. Here is a *superfedeas* to that *superfed'*, *quis erronee et improvidè emanavit*, which sets the matter at large, as it was before. In *Turner v. Falgate*, 2 *Sid.* 125. (a) GLYNNE ruled that the vacating of a judgment made it as null and void; and that an action lay against the sheriff for levying an execution in pursuance of such judgment: it is true, that hath been denied since; but yet is so far true still, that except as to the justifying of officers who act under it, it is as if it never had been. This may be compared to the case in *Drurici's case*, 8 *Co.* 143. If two judgments be, and one depends merely on the first, as in debt on a judgment, reversal of the first reverses the other; à fortiori in case of the vacating or superseding of a *superfedeas*; it is a mandatory writ, the vacating of that *superfedeas* vacates all the consequences of that *superfedeas*, and it is now as if it never had been. We are not here arguing to make trespassers by relation, but to relieve creditors against a cheat. Suppose I do agree that the first *superfedeas* did countermand the authority of the commissioners, but yet what they did before was valid and fulfilled the words of the statute, their dealing was effectual, because so far their power was well executed; and here it is found it was dealt in, and that takes off the objection of the parties death: but further, supposing the first *superfedeas* did determine the commission, and it was not utterly null and void, yet it is but a *superfedeas*, and a *procedendo* revives it; as an *habeas corpus* in common practice to an inferior court stops, because it removes all, yet a *procedendo* revives it, 12 *Affize* 21. *Bro. tit. "Commission"* 12. A *superfedeas* comes to commissioners of oyer and terminer by which their commission is in a manner repealed; yet on a *procedendo* they may proceed, and this *per advisament' omnium justiciar'*. It is but as a prohibition to court christian, which upon a consultation may proceed: if a suit be stayed *rege inconsulto*, yet on a *procedendo* the court shall proceed as before. THIRDLY, It may be objected that is a new commission granted to new commissioners. I ANSWER that well enough, because it recites the former, and is still in pursuance of it: by 34 Hen. 8. c. 4. the chancellor shall take order with the bankrupt's body, lands, and goods; and 13 Eliz. c. 7. l. 2. doth not take away that power, but enlarge it; that

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the chancellor for the time being upon complaint, shall appoint such persons as to him shall seem good; so that plainly he hath the power to name, and the words "upon every complaint" have been construed to be from time to time, and upon complaint against the commissioners as well as against the bankrupt. As to the words, "the said commissioners" in 21 Jac. 1. c. 19. in the clause found in this verdict, it is not to be intended of the persons named in the first commission, but of the authority of any person named by the chancellor, as commissioners for the time being. As in acts of parliament, "the said chancellor" * is to be so meant, therefore that objection is not conclusive. The commissioners have no interest, they are only instruments to convey by assignment, as a lord of a manor in copyhold admittances, or a sheriff in sale of a term by a *ieri facias*. If the commissioners die, surely they will agree new ones may be made, and yet that would be no more "the said commissioners" than it is here: suppose they all misbehave themselves, a new one may be granted. It is no objection to say they usually are of adjuncts; for the great seal hath an indefinite power of nomination, and may do otherwise. *Stone's Reading* on these laws, *paragr. ult.* "If after seizure, and before distribution all the commissioners die but one, a new commission may be granted, and the new ones shall call the old to an account:" and *pag. 19.* "if they all die but two, a commission shall be awarded to others and not to them, and they shall be called before the new commissioners as persons having the bankrupt's estate in their hands:" the commissioners are no court in their proceedings; they need no adjournment; so no discontinuance upon that account. "The said commissioners" are such as shall be appointed for that purpose; this seems natural. By the demise of the king, the commission abates, then there must be a new commission. (b) Now by their opinion, if strictly true, no further proceedings could be after a demise of the king, for they are new commissioners though the same men. I can find nothing in any of the statutes that gives colour for an opinion that the first named commissioners are unremoveable: by the 34 Hen. 8. c. 4. the chancellor himself and judges might make a sale, for they might "take order as to them seemed meet." Compare it to cases at common law, one attorney removed, a new one may proceed; and after judgment may pray execution, even without a warrant, and may before judgment proceed with warrant, *Goldsb. 49.* An attorney general files an information, and prays process, a new attorney may join issue; which shews it is the office and power, not the person which the law so much regards. A * commissioner is merely a minister and hath no interest, and passes nothing by assignment, but the bankrupt's right; and if one of the commissioners have right in the bankrupt's estate, this assignment will not extinguish such his right, *Godb. 319.* agreed in the case of *Lord Sheffield v. Rivett, Moore 1153.* A commission of charitable uses sued out of fraud

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(b) By 5 Geo. 2. c. 30. s. 45. it is enacted, that "no commission of bankrupt shall abate by reason of the death

"of the king, but such commission shall continue in full force."

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to avoid a charitable use, the commissioners make a decree for exemption from the charity, and that decree confirmed by the chancellor, yet a new commission was sued on the statute of charitable uses, and the lands charged with the charity; and yet the words of 43 Eliz. c. 4. are, "the said commissioners to make order, &c." *Moore Char.* 75. There is no difference between this and a commission of adjuncts, which is a common practice; for if a greater number be added, that major part may act, and it shall be good, and if so, it is the same thing. As to the objection, that then several commissions may be granted at once. Here is no such thing, for that the first was determined by the demise of the king. **SECONDLY**, The sole power of nomination is lodged in the chancellor, and a new commission will be a determination of the power of the former persons, though the authority be still pursued. So I prayed judgment for the plaintiff.

The acts done
by commissioners
of bankrupts
are traversable.

THE COMMISSIONERS have their authority under the great seal and by act of parliament, and yet what they do if not pursuant is traversable, because no other remedy, and so is *Cuts v. Delabarre*, cited at the end of *Dr. Bonham's case*, 8 Co. 121.

In ejectment on
the demise of
assignees of
bankrupt, if
the demise be
found prior to
the inrolment of
the bargain and
sale, it is fatal
to the action.

S. C. Carth
178.

1 Danv. 696.

Cro. Jac. 52. 408.

Cro. Car. 109.

MR. TREVOR, *à contra*, insisted only on an exception to our declaration in ejectment, that the inrolment was the twenty-second of January, and lease, entry, and ouster in the declaration was laid the nineteenth, and, nothing passing till inrolment, (c) there was no title in the lessor at the time; and that in the case of *Perry v. Bowyer*, this was the only point, and judgment for the defendant. The which was an exception that I was not aware of, not having a copy of the declaration, but only of the special verdict, which made me (as it did some others) suspect the truth of our agent. Thereon we had day given us.

Hetley 80. Hob. 136. 1 Vent. 360. 2 Jones 196. Skin. 30. Co. Bank. Law 352.

A declaration in
ejectment can-
not be amended
by altering the
time of the de-
mise; for that
would make it
a new demise.

S. C. Carth. 128.

Carth. 401.

5 Mod. 532.

1 Vent. 361.

2 Stra. 850.

1011. 1211.

2 Burr. 1161.

4 Burr. 2448.

8 Barnes 13.

153.

Fitzg. 103.

1 Term Rep. 600.

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Then I **ARGUED** for an *amendment*, that the date of the lease in our declaration might be amended and made the twenty-fourth of January, that so the other points might come in question, and that for these reasons, **FIRST**, Because it is an ejectment lease, which is still under the power of the court, and at the trial other points were insisted on, and were accordingly found, and consequently such an amendment cannot * deceive the party. **SECONDLY**, This amendment can never deceive the jury, for they find that by virtue of the assignment the lessors of the plaintiff entered and made the lease in the declaration, which must be therefore after the inrolment, and consequently such amendment will be agreeable to their finding. **THIRDLY**, The issue roll is of *Trinity Term*, and the declaration was delivered to the tenant in possession in *Easter Term*, and that was after the title accrued to the lessors, *viz.* after inrolment, and

(c) See 13 Eliz. c. 7. the 1 Jac. 1. c. 15. and the 21 Jac. 1. c. 19.

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so neither party nor jury can be deceived by such amendment: for this was not the point in question, as it was the only one in the case of *Perry v. Bowyer*. As to the objection that it is all entered on record, and in another term, that is nothing, for amendments have been three terms after, as in *Rawlin's case*, 4 Co. 53. though that were according to the notes, yet it is an answer as to the time and entry on record; the like is *Sir Humphry Tufston's case*, Cro. Car. 144. as to time and record. (d) This is nothing but the mistake of the clerk in laying his fictitious supposed demise three days before the title accrued, and so it is as much the mistake of the clerk as the case of *Forger v. Sale*, Cro. Car. 147. and *Jones* 199. which CROKE and WHITLOCK Justices, held amendable (e), and "devisit" instead of "dimisit, *March v. Sperry*, Hob. 249. and a venue added to the commission in trover, 1 Roll Abr. 209. The date of a demise in ejectment was amended after judgment by confession, and writ of error brought for that very fault in the case of *Parr v. Cowley*, upon my motion last term, on shewing the warrant of attorney (f). In case for words a declaration generally of a term, and the words laid some days in term, liberty is usually given to make a special entry of a day of preferring the bill, because otherwise the action would be before the cause, relation being to the first day of term; and this is done frequently if the bail-piece were after the cause of action; and this we think like our case, where the declaration was delivered after, though the demise be laid after the title accrued. If *Keble's Reports* might be cited for authority amendments have been in fact as material as this, *Countess of Falmouth's case* in LORD HALE's time. 3 Keb. 117. and *Place v. Twiford*, 2 Keb. 120. *Williams v. Moore*, 2 Keb. 175.

But HOLT Chief Justice held it not amendable, because no other lease than what we had laid was confessed, and that it was material. Sed adjournatur. We moved it several times, but could never get over it (g).

(d) Dougl. 376. 730. 1 Com. Dig. 314.
1 Bac. Abr. 96. Cowp. 407. 1 Term
Rep. 782. 3 Term Rep. 657.

(e) See Ld. Ray. 133. Stra. 954.
1 Burr. 321. 1 Will. 33. 1 Dougl. 361.
1 Term Rep. 783. 3 Term Rep. 349.

(f) 2 Burr. 1161.

(g) Sed vide the cases of *Marlborough v. Skinner*, 2 Stra. 890. Fitzg. 191. *Adin v. Parkin*, 1 Burr. 665. *Baker v. Cole*, 3 Burr. 1161. and *Hardman v. Pilkington*, 4 Burr. 2447.

Mr.

* Mr. Crooke's Case.

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The statutes
17 Car. 2. c. 3.
and the 22 Car.
2. c. 11. f. 68.
enact, " that
the parishes
thereby united,
shall, as to all
rates, &c. re-
main distinct,
and that the
patron of each
parish united
shall present by
turns, the patron
of the church
of the best value
to have the first
turn ;" a pa-
tron subject
therefore of a
benefice greater
in value shall
have his turn
before THE
KING who is
patron of a
church of less
value.

Dyer, 259.
3 Lev. 96.
2 Jones, 160.
1 Salk. 165.
Skin. 616.
Fitz. 169. 250.

UPON a presentation to the church of *St. Michael Wood-street*, and a caveat entered against the institution by the presentee of the present king, I being of counsel for *Mr. Crooke* appeared and argued his case before DR. NEWTON.

The case was thus. By the act of parliament 22 Car. 2. c. 11. It is thus enacted, f. 63. par. 26. " That the parishes of *St. Michael Wood-street* and *St. Mary Staining*, shall be united into one parish; and the church heretofore belonging to the parish of *St. Michael Wood-street*, shall be the parish church of the said parishes so united." And in sect. 68. " that notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and duties whatsoever, other than what are herein before mentioned and specified, shall continue and remain distinct as heretofore; and that the several and respective patrons of the said churches so united shall and may present by turns to that church only which by this act is to be rebuilt and established for the parish church of the parish churches so united as aforesaid; the first presentment to be made by the patron of such of the said churches, the endowments whereof are of the greatest value." *Dr. Martin* was incumbent at the time of the union, and so continued to the time of his death, which happened very lately, and by his death the church is now vacant. THE KING is patron of *St. Mary Staining* (of far less value both in the king's book, and the clear yearly value) and presents J. S. A common person is patron of *St. Michael Wood-street*, who presents *Mr. Crook*.

And for him I prayed institution.

2 Roll. Abr. 343.
3 Com. Dig.
"Eglise"
(H. 6.)

The counsel for the caveat argued for the prerogative, that in case of three coparceners, and one be in ward, the king shall have the first turn, and the king not being named, the act of parliament shall not bind him or his interest.

Plowd. 240.
Hob. 146.
7 Co. 32.
Moor. 540.
Co. Lit. 98.
11 Co. 68.
4 Bac. Abr. 200.

E contra I argued, that abundance of statutes do not bind the king when he is not named; they are most of them mustered together in 11 Co. 68. *Magdalen College case*: but yet there fol. 70, 71. the 13 Eliz. c. 10. is adjudged to bind the king, though not named, FIRST, Because the general letter extends to the king by the words, " to any person or persons," and the queen was a person: so here a patron. Then says that book, if the king be exempt, it must be by construction of law, and such construction shall never be made against the express sense or reason of the law makers mentioned in or to be inferred from the act: and as the king, lords, and commons had, in the preamble there, adjudged long leases to be unreasonable, and tending to irreligion, so here the king, lords, and commons have declared that the necessity of rebuilding of churches could be in no other manner; for several parishes were not able to rebuild.

The

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The king is bound by laws of public use and benefit, and where contrary will be a wrong to the subject all statutes made to prevent the decay of religion bind the king. (a) He is bound by many laws where not named. (b) He is bound by the statute of Marlbridge, c. 22. against the distraining of tenants to answer of their freehold without writ; his bailiff cannot distrain; if he do, attachment lies against him. (c) He is bound by 32 H. 8. c. 28. concerning *discontinuances* though not named (d), because made to give her that had a right, a more speedy remedy, viz. by entry, when by the common law she was forced to a real action; and many others there are of the like nature. I confess the king hath prerogative in many more instances than they have named, but the constant rule is, that he can do no wrong (e), and here this would be a wrong to our patron, for he hath the first presentment; it is a wrong to prevent him of it. Then consider the nature and effect of an union; by the common law, upon the consolidation of two churches, one becomes extinct in law, and as *Godolphin* (f), *illud quod alteri unitur, extinguitur neque amplius perseverare*, so the king's church is gone by that notion. Now of this union there are three several sorts; one of them is when a church is so united to another that that which is united *amittit jus suum, et eo utitur cui fit unio*; and another is when two or more churches are so united together that one is not subject to the other, in which case *quod melius est retinetur*. I cannot but observe the several reasons or causes in the law for a consolidation, or union, or annexation of churches for the better hospitality of the rector, the propinquity of churches and places that one may discharge the duty and cure of both, the want or defect of parishes, or extreme poverty of one parish, these are reckoned the causes by the common law of an union when made by the consent of bishop, chapter, patrons, and incumbents of livings: now the same reasons may be supposed when made by act of parliament; and if so, then all the reasons which held * in *Magdalen College case* (g), as promotion of hospitality, and to prevent the decay of religion, and consequently the king bound by this law; but taking it at common law, this union gives the presentment to our patron, for the more worthy benefice is never united to the *minus dignum*, and therefore a parochial church cannot be united to a chapel, *magis dignum attrahit ad se minus* by our law, as wine the hoghead, deeds the box, house the heirlooms, and the like. Here the king is bound; for if not bound they have no right to a presentment to our church. The king takes a benefit by this clause; it is plain that he is bound, for otherwise he could not have any presentment to this church aforesaid at all; and if he take he must take it under the modes and qualifications that the act gives it him. Suppose a private person by will had devised an advowson to the king and a college, declaring, that they should present by turns, and that the first presentation

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(a) 5 Co. 14. Plowd. 136. 11 Co. 68.

7 Co. 32.

(b) See 4 Rec. Abr. 199.

(c) 2 Inst. 241. 249. See vide Plowd. 240.

(d) 2 Inst. 687.

(e) 1 Bl. Com. 246.

(f) Godolphin's Repertorium Canonici, page 169.

(g) 2 Roll Abr. 191. 11 Co. 66. 1 Roll Rep. 151. Cro. Jac. 364. 2 Bulst. 146.

should

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CASE.

circles on
rma's
etc of
liament
ment in
in Digest
d 2. page 30

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should be by the college, would not the college in that case have the first presentment; here the same act that appoints the union, unites their's to our's, and not our's to theirs, and consequently gives us the right *prima facie*, the king consenting. Then besides, the same act that directs the king to have any presentation to our church, directs the first to us: it is all but one entire sentence. It is well known that in acts of parliament on the roll, there are no points, commas, colons, semicolons, or other notes or signs of division; that is added by the printer, and as it is on the roll, the whole makes but one paragraph; the sense is to direct the division, and the sense directs no division at all between the words that enact a presentment by turns, and the first presentation to us. Either the king is included in this act or not; if he be the words plainly give us the first presentation; if he be not included, meant, or concerned by this union, then there is no colour for this *caveat*, for then they cannot pretend to a presentment to our church; let them get one to their own; we desire only a presentation to our own church, that is all we pray at present, and the right to tithes out of their's, we will controvert afterwards; but it seems very hard to say, that the king is not bound, because not included, because not named, and yet he shall be included as to benefit. If * they have any right, the king can only have it by this act of parliament, and then they must have it as this act of parliament gives it. That it is a benefit to them is plain, because by the union they have the advantage, ours being the greater. The subject to which the union is, is our church, and that bears the name and attracts the rest unless it be otherwise provided for by express words, and the express words are with us: they agree, the king is bound by that part which excludes him from his ancient right of presenting to the church of *St. Mary Staining*, and gives him a new right to present to ours, and yet will deny him bound by that part which vests a right in us, and yet the former is much stronger than this; if bound by that, much more reason that he should be bound by this: and I do affirm positively that an act of parliament which gives a right to the king shall bind him, as to the manner of enjoying or using that right, as well as a subject. That the king is bound by this clause, doth appear from sect. 69. where the king's prerogative right is particularized and expressly taken notice of, for that section saves to him and his successors, all tenths and first fruits in the same manner as before the union they severally stood charged. I urge this to shew that our law makers esteemed the king's right bound, otherwise there would not have been such an express saving; and if they had designed the king to have had the first presentation, though his church were of the less value, they would have taken care of him in that particular also by an express saving. In the *Lord Berkley's case* (b), the king is bound by the statute *de donis*. He was bound *per formam doni*; it is held (i), that if land had been given to the king and the heirs of his body, he, before the statute of Westminster the

(b) Plowd. 246.

(i) In the case of Alton Woods, 1 Co. 44.

second, could not have aliened in fee before issue, for an alienation by another would be *a tort*, and so would it be in the king, if it should be adjudged an alienation in fee. And this cannot be, for his prerogative will not be a warrant for him to do any injury to another, and the estate which the king had would not suffer such an alienation, because not large and ample enough; and his prerogative will not alter his estate, nor make it greater than the donor gave it him. And a little after, in the same book (*k*), such alienation is said to be *tortious*, because *contra voluntatem donatoris*, and therefore ill done; for men ought to observe the intent of other men in lawful things, and to break it is ill. Here • * [212] the parliament are the donors; they give the king and my client a right to present to the church of *St. Michael Wood-Street*, by turns. The king had no such right before. The mode and form of that gift is, that the king have the second presentation, and so on; now if the king have the first, that intent is broken and we are injured, and if it were a common person, and he should first present, that would be an injury, and so here. (*l*) It is the opinion of *ENGLEFIELD Justice*, That where a man takes a gift by act of parliament of any land (though there were an ancient right) neither he nor his heirs shall be remitted; for when land is expressly given by act of parliament which is a judgment, neither he nor his heirs shall claim any other estate or right than what is given by the act, and yet remitter is a title favoured in the law. I urge this to shew that the king's ancient right will not affect this case; that an act of parliament giving a right which the king hath is new to both the churches; and then that right is to be joined in manner and form as the act directs.

So I concluded for *Mr. Crooke*, and prayed that he might have *institution*. And he had it accordingly, and enjoyed it without further trouble as ever I heard: though there were two instances in *London* where, under colour of this prerogative, the king's presentee was first preferred, though his living were of less value, as was affirmed, *viz. Dr. Parry*, and *Dr. Bridges*. But this was done by *JEFFREIS*, and never contested, &c.

(*k*) 1 Co. 47.

(*l*) Brooks Abr. title "Remittitur"

pl. 49. from the Year Book, 29 Hen. 3.
pl.

Case 145.

* Price *against* Harstong.

* [213]

Error lies on a judgment in Ireland.

ERROR on a judgment in the King's Bench in *Ireland* on a writ of error there (a) on a judgment in the court of the archbishop of *Dublin* in debt upon an obligation, wherein the plaintiff declared that the defendant did acknowledge himself to be bound in six thousand pounds whereof four thousand four hundred pounds is paid; and the defendant craved *oyer* of the condition, which is to pay three thousand five hundred pounds, with interest, thirty days after notice, and pleaded that he paid the four thousand four hundred pounds in satisfaction within thirty days after notice. The plaintiff replies non-payment within thirty days, *et hoc petit quod inquiratur per patriam, et prædictus THO. similiter, &c.* And then the defendant demurred; and the plaintiff joins: and judgment for the plaintiff, because the replication was good and sufficient. And now here the *general error* (b) is assigned.

I ARGUED for the plaintiff in the writ of error; but THE SOLICITOR being to argue it afterwards, had my notes to this effect.

Stile of a court held *per consuetudinem*. Ante, 47.

FIRST. The stile of the court is a court of the king's held there *per consuetudinem*. Plaint is levied, *de placito debiti*. The defendant appears upon summons in *placito præd.* The plaintiff the same day produced *quandam billam suam de placito debiti quæ quidem billa sequitur in hæc verba*, and doth not say *secun' consuetud' in plac' præd.*

There cannot be a demurrer after issue joined. 5 Com. Dig. 139.

SECONDLY. There is *issue joined* and afterwards a demurrer; for the last ought to have been rejected, because the *interpleader* between the parties was at an end, and the matter put in issue, and no judgment ought to have been till the issue was tried.

Replication.

THIRDLY. The replication is ill, because he did not say "pay *infra* thirty days," whereas he should have said, "and not before, &c." for a payment on the day will be a payment within the condition.

A replication that does not state sufficient to maintain the action, is bad. 1 Mod. 57. Fost. 344. 2 Wils. 267. 3 Term. Rep. 374.

FOURTHLY. The condition is to pay three thousand five hundred pounds, with interest. The plea is, that he did pay the four thousand four hundred pounds in satisfaction within thirty days after notice, which is within two years, so that there was not so much then due. The replication, and issue is tendered upon payment of the four thousand four hundred pounds, and doth not say "or three thousand five hundred pounds with interest," so that the principal money and interest might be paid, though not the four thousand four hundred pounds, and consequently no good repli-

(a) But see the 22 Geo. 3. c. 28. and the 23 Geo. 3. c. 53. by which this appeal is abolished.

(b) See 27 Eliz. c. 5. and 4 and 5 Ann. c. 16.

cation;

cation; for though it should be found for us that the sum was not paid, yet the debt might; and so upon the whole matter there might be no cause of action.

PRICE
HARSTONG.

THEN I URGED several authorities, that it is not enough for the replication in * this case not to destroy, or falsify the plaintiff's cause of action, but it must maintain it; there must be a good breach assigned in the non-payment of the principal money mentioned, otherwise the replication cannot be said to be good; and judgment ought not to be for the plaintiff. That a breach was necessary though our plea was ill, I cited several cases to prove; and the difference to be, where such ill plea admits or supposes a non-payment or non-performance of the condition, there was no need of breach in the replication (c), but if the plea did not admit the same, there though the plea was ill, yet if no good breach in the replication, the plaintiff could not have judgment; sundry books I had to evince and back that difference.

In debt on bond, where the plea though bad, does not admit non performance, the replication must alledge a sufficient breach.

Yelv. 25. 78.
152.
Hob. 198.
Cro. Eliz. 320.
899.
Cro. Jac. 220.
Lut. 529.
1 Mod. 227.

1 Saund. 102. 2 Saund. 180. 1 Salk. 140. 2 Will. 11. 267. 293. Stra. 227. 1 Burr. 574. 2 Burr. 772. Comp. 578.

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LEVINS *Serjeant* prayed time to answer it; and the next term moved for a *certiorari* to *Ireland*; which I opposed, because here was nothing wanting, and no *diminution* could be alledged; for the errors were rather surplufage, and the replication could be never mended unless they returned another record, which is not allowable in any case: besides, *diminution* could not be alledged, nor a *certiorari* granted after in *nullo est erratum* pleaded. But *PER CURIAM* a *certiorari* may be granted at the prayer of the defendant in error *ad informandum Curiam* at any time, and when returned it will appear if the same record or not.

The Court may award a *certiorari* after in *nullo est erratum*, pleaded.

See vide
1 Sid. 139.
Moor. 700.
Cro. Eliz. 84.
Cro. Jac. 141.
1 Salk. 269.
Stra. 440.
B. R. H. 118.
5 Com. Dig.
Pleader (3 B. 13.)

THE COURT inclined to hold the second and fourth exceptions to be fatal errors; and in Hilary Term, 4 William and Mary, rule for reversal.

(c) Ante 148. Yelv. 25. Cro. Eliz. 320. 899. 1 Sid. 290. 3 Lev. 24. 1 Vent. 114. 226. Carth. 116. 1 Salk. 138. 1 Saund. 102. See also, 5 Com. Dig. "Pleader" (F. 15.)

Case 146.

Willet against Tidey.

Easter Term, 3 William and Mary, Roll

On a general verdict in favour of the defendant in an action where special case and general indebitatus assumpsit are joined, if the judge certify that the defendant justified as an officer under an act giving treble costs, the Court will award them on the assumpsit, though it does not otherwise appear that the defendant took the money as an officer.

S. C. Carth. 188.
S. C. 12 Mod. 6.
S. C. 2 Dan. Abr. 223.
Jones, 305.
Cro. Car. 175.
285.
2 Vent. 45.
Annally's Rep. 125.
Douglass. 107.
245. 307. 780.
1 Freem. Rep. 252.
1 H. Bl. Rep.

DECLARATION in case upon an *indebitatus assumpsit* for twenty shillings had and received to the plaintiff's use; *cumque etiam*, the defendant a collector of the tax assessed, 1 Will. and Mary, in the county of *Sussex*, had seized several goods of the defendant's by colour of non-payment of the tax, and had sold them for less than he might have procured for them by twenty shillings; to the plaintiff's damage forty pounds. The defendant (imprudently enough) pleaded (*a*), *non assumpsit* to the first, and *non culpabilis* to the other. A verdict (*coram Rookesby*) generally for the defendant.

The judge of the assizes certifies on the back of the *posse*, that the defendant justified by the act of 1 Will. and Mary, for the tax, &c.; but Mr. JOHN ASHTON refused to tax treble costs.

I MOVED the Court for treble costs on the clause in the act; "that if any action, &c. for what he and they shall do in pursuance or execution of this act, such, &c. may plead the general issue, and upon issue joined * may give this act and the special matter in evidence, and in case of non-suit, discontinuance, or verdict against the plaintiff, the defendant shall have treble costs."

Mr. DARNELL opposed upon the case of *Stone v. Linger*, Cro. Car. 467. Action against the churchwardens for a false presentment, where double costs are denied on the 7 Jac. 1. c. 5. (*b*) because a special action of the case for a misbehaviour in their office, and not trespass or false imprisonment, whereon liberty was given to plead the general issue, and shewed the special matter in evidence, and the case of *Kentinal v. Smith*, Cro. Car. 285. Jones 305.

* [215] But I answered *à contra*, that the penning this act was different; for it was upon "any issue joined," this was not for a misbehaviour in

(*a*) For it was agreed by all that the special action on the case and the assumpsit were inconsistent; and that the defendant might have demurred to the declaration; for it required a different and double an-

swer. S. C. Carth. 189. See also 3 Lev. 99.

(*b*) See also 21 Jac. 1. c. 42. and 24 Geo. 2. c. 44.

the office, but in disaffirmance of the power by which we were collectors. We received twenty shillings by virtue of the act; the plaintiff says we received it to his use, for we had no power or authority to receive, and therefore brings an *indebitatus*: now we plead *non assumpsit*, and upon the trial we give in evidence, the act and the verdict ~~for us~~, and the judge certifies accordingly, and therefore I pray treble costs on that account. With the other I meddle not.

WILLET
v.
TIDY.

And so THE RULE was for treble costs.

Styart against Rowland.

Case 1470

DEBT for ten pounds *pro eo quod cum* the defendant had accounted with the plaintiff of divers sums as due, and upon that account was found in arrear eight pounds, *per quod actio accrevit* to have the said eight pounds *cumque etiam* the said defendant had borrowed of the said plaintiff ten pounds, to be paid on request, *de quibus quidem separatibus denariis sum'* this defendant afterwards satisfied eight pounds, yet the ten pounds hath not paid. Plea, *nil debet*. On the trial they gave in evidence only eight pounds, which I URGED could not be evidence of the *mutuatus*; for that was one entire contract, and another contract for eight pounds was not the same they had declared upon: and of that opinion was the LORD CHIEF JUSTICE HOLT.

What shall be
evidence of a
mutuatus

Then to prove the *insimul computasset* they proved that the defendant and plaintiff's wife reckoned that the defendant had borrowed at one time forty shillings, at another time forty shillings, and at another time four pounds, and this came to eight pounds, and he promised to pay it. I URGED that this could not maintain an *insimul computasset*, for that it was only a reckoning on one side, for there was neither payment nor deduction on the other, and at that rate saying * one and one was two would make an account. But HOLT Chief Justice over-ruled me, that it was good evidence of an account, and so they had a verdict *quoad comput'* for the plaintiff, and *quoad resid'* for the defendant.

Evidence that
the defendant
borrowed mo-
nies at different
times, and that
it amounted to
so much is good
proof of an *in-
simul computasset*.
Bull. N. P. 129.

* [216]

Then I MOVED in arrest of judgment, that no judgment could be on this for the plaintiff, because the verdict was *repugnant* to, and different from the declaration, for the declaration acknowledged part of both the sums to be received, and consequently part of the

A verdict re-
pugnant to the
declaration in a
material point
is bad.

2 Roll. Abr.

695. 702. Hob. 262. 3 Mod. 72. Cro. Car. 495. Barnes 476. Stra. 873. 1131. 2 Will. 160.
1 Burr. 326. 2 Burr. 698.

STYART
v.
ROWLAND.

eight pounds to be received, and the jury had found the contrary that there was nothing due on the *mutuatus*, and that the whole eight pounds in the *insimul computasset* was due, so that they have found the plaintiff's declaration to be false.

But by *DOLBIN Justice*, the exception was too nice.

And by *HOLT Chief Justice*, the ten pounds, if received of any of the two sums, was received out of the several sums.

And so by *THE COURT* the plaintiff had his judgment.

* Trinity Term,

• [217]

The Third of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt. } *Justices.*

Sir GILES EYRES, Knt.

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King against Oxenden.

Case 148.

See this Case post, page 261.

NOW I argued (a) that a *mandamus* did lie to restore A PROCTOR to the exercise of his office that was unduly removed, because his business concerns the administration of public justice, and tends to the public welfare. A *mandamus* lies for all offices of a public nature, or relating to the administration of justice: this office is necessary; for it is morally impossible that all manner of persons, as infants, children, persons diseased, who pray relief of justice, can do all their own business * there any more than they

A *mandamus* does not lie to restore a proctor in the spiritual courts; for they have jurisdiction over their own officers.

S. C. 3 Lev. 309. S. C. Holt. 435. S. C. 3 Mod. 332. S. C. Carth. 169. S. C. Skin. 290. S. C. 3 Salk. 230. 1 Sid. 40. 169. 2 Lev. 18. Fitzg. 123. 194. 8 Mod. 148. 10 Mod. 214. 12 Mod. 190. Skin. 45. And. 101. Stra. 58. 608. 696. 1082. 2 Ld. Ray. 1004. 2 Burr. 1044. 3 Burr. 1647. 3 Bac. Abr. 531. Comp. 412. 523. Dougl. 629. S. C. Post. 251. 261.

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(a) See the return made to this *mandamus*, and the first argument on it, post, 261, and the second argument, with the opinion of the judges, post, 271.

KING
v.
OXFORD.

can without an attorney; it is therefore to be compared to that of AN ATTORNEY. He takes an oath as an officer of the court; and this appears by the return where the oath is mentioned: nay they are mentioned in poll acts as well as attorneys: nay, he is mentioned in 16 Rich. 2. c. 15; and therefore may be well presumed to be time immemorial. The ecclesiastical court is a court of justice allowed by and known to the common law of England: it is a court for punishment of offences and immoralities; as incest, adultery, drunkenness, &c. A PROCTOR is an officer there, and this court will take notice of him, for you need no information, as Mr. ATTORNEY says, to acquaint you with the nature of his office, but only for remembrance. As to the objection, That there never was a *mandamus* granted for to restore a proctor: I answer, That there never was one moved for such trivial causes; but there always was a first in every action, and if the same reason hold in this as in the other, it is as fit to be granted as in those. This court hath a general jurisdiction over all the other courts in England, especially over the inferior courts and courts christian; you will correct what inferior courts do amiss; you have granted *attachments* for the abuse of your process. It is true, you will not meddle with the court of Common Pleas about their own officers or concerns, but that is because the course of their court is the law, and of that they are judges, and their's is one of the SUPERIOR COURTS; but it is otherwise in INFERIOR COURTS, for there their course doth not justify, if contrary to the general law of the land: here is a man injured; there is no relief in the world but submission to the wrongdoer, unless you allow him the aid of this writ. Besides, in common cases, if the ecclesiastical courts proceed otherwise than according to the law of the land, even in causes belonging to their own jurisdictions, you grant *prohibitions*, as in case of refusal to admit one witness to prove payment of a legacy. (b) You do take notice of the prejudicial acts of the courts christian, as excommunications; you allow it as a disability; you write to them to absolve them by the writ *de cautione admittenda*. Prohibitions are directed to the proctors as well as to the judges and parties, you do every day make rules upon notice to the proctor: then a *mandamus* is a remedial writ, like to an *habeas corpus*, and this is our livelihood; it supports our family; and we have no other remedy; for an *affize* doth not lie; therefore a *mandamus* doth. (c) An action of the case is but imperfect; that only gives damages; it works no restitution; and an action upon the case cannot recover damages to us for the loss of a life's practice, and therefore must be repeated, which the law abhors. A *mandamus* lay in several cases, though not so frequent for officers: in *Bagg's case*, (d) the reason given in the first resolution there, is that which reaches this case, viz. that to the court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial tending to the breach of the

• [219]

(b) See the case of Shatter v. Friend, ante 158. 172.

(c) Rex v. Barker, 3 Burr, 1265. Rex

v. Wheeler, B. R. H. 99. Rex v. Bp. of Chester, 1 Term Rep. 396.

(d) 11 Co. 58. 1 Roll Rep. 173. 224.

peace, or oppression of the subject, or to the raising of faction, controversy, or debate, or to any manner of misgovernment, so that no wrong or injury, either public or private may be done, but that it may be reformed or punished by due course of law; all this reaches our case: this court is the supreme court of justice in all causes whatsoever, (e) and this court sends *mandamus's* to them to command them to grant administration to inferior courts to proceed to judgment and execution; to restore an act of an inferior court; as *Hurst of Canterbury* (f), *Hastings of White Chapel*, for a parish clerk, (g) to swear a church-warden (h) or constable, (i) who are but annual officers; nay for an assistant of a company, as to one of the Skinner's company, as I have been informed, (k) which office is not of great trust, this concerns himself and family, and all that think fit to employ him; and since their number is stinted to twenty eight, it concerns every body; for no man but may have occasion for his help. It concerns the public, as court of arches is a court of justice for punishing offenders, and determining of ecclesiastical rights.

* KING
v.
OXFORD.

But after all, THE COURT were of opinion, that no *mandamus* lay; that the king hath two jurisdictions, one *temporal*, another *ecclesiastical*, and they have different laws and different processes, and they are judges of their own officers; that this is no temporal office; that they could not take notice * of what he is, or what estate he hath, whether for life, or how; that he is a spiritual person, and they have jurisdiction of him; that they make, and they may unmake him; and they cited *Jones* 187. 13 Co. 7. 2 *Rolls Rep.* 107. and 1 *Rolls Abr.* 536.

* [240]

And so no *mandamus* by HOLT Chief Justice, EYRES and GREGORY Justices, DOLBEN Justice. being absent; but he was of the same opinion, &c.

(e) 2 Hawk. P. C. 7. 9.

(f) Raym. 211. 1 Vent. 143. March 101.

(g) 1 Keb. 286. 1 Mod.

(h) Margh. 101.

(i) 1 Vent. 143. Stiles, 346.

(k) 1 Sid. 107. 1 Lev. 91. Raym. 69. Stra. 555. 1003. 1180. 1 Burr. 127. 4 Com. Dig. 206.

• Michaelmas Term,

• [241]

The Second of William and Mary,

I N

T H E K I N G ' s B E N C H.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Aishcombe against The Hundred of Spelholme.

Case 149.

Hilary Term, 1 Will. & Mary, Roll 901.

See this case ante, page 94.

HELD now PER CURIAM to be for the defendant, and that the servant must be sworn; for it is plain within the intention, as well as words, and one of the servants might know the robbers. 1 Lev. 323. The end of the statute of 27 Eliz. c. 18. was to purge the party that he was not confederate with the parties robbing. Styles 156. If the master had been present, it had been a robbery of the master. Judgment for the defendant as to the money in *Coxhead's* custody, &c.

S. C. Holt. 460. 637. S. C. 3 Mod. 287. S. C. Carth. 145. S. C. Salk. 613. Styles 156. 2 Roll Abr. 685. 2 Hawk. P. C. 117. Ld. Ray. 829.

A master may maintain an action of hue and cry for a robbery committed on his servant; but the servant must be sworn.

S. C. ante, 94.

Case 150.

Hobbs, qui tam, &c. against Young.

Hilary Term, 2 Will. & Mary, Roll 19. or 129.

A merchant who hires cloth-workers and dyers to make and die cloths for the purpose of exporting them abroad in the way of trade, is liable to the restraint and penalties of 5 Eliz. c. 4. f. 31. although all the journeymen so employed have served regular apprenticeships to their respective trades, and the work is done in his own house.

S. C. Post, 266.

S. C. 2 Salk.

610.

S. C. 3 Mod.

313.

S. C. Comb. 179.

S. C. Carth. 162.

S. C. Holt. 66.

5 Com. Dig.

"Trade" (D. 6.)

1 Burr. 2.

4 Burr. 2449.

3 Bac. Abr. 553.

• [242]

DEBT on the statute of 5 Eliz. c. 4. On not guilty pleaded a special verdict finds the defendant a merchant trading by exportation to *Turkey*, never apprentice to THE CLOTH-WORKERS; that for his own merchandize he employed journeymen in his own house, who had been apprentices, and such one to over-look, and gave them all weekly or yearly wages, &c.

ARGUED for the plaintiff that this is using the trade, &c. that by the statute 37 Edw. 3. c. 6. artificers are to hold to one mystery; that the 38 Edw. 3. c. 2. repeals that only as to merchants, and so the 37 Edw. 3. c. 6. continued till 5 Eliz. c. 4; that he who cannot use a mystery himself, cannot employ others for that purpose; and so was the case of *Mason v. Nightingale*, 3 Jac. 2, for the trade of pin-making, resolved within the statute, though he employed none but those who had been apprentices. In the case of *Pardoe v. Couth*, the same opinion, and a verdict for the plaintiff. In *Dalton's Just.* 105. one takes a miller and employs him in his trade, this is a trading, if not for the private use of his family. A merchant cannot brew for transportation; it is not for the use of his own family here; though the poor men have wages, yet they have not the benefit of the trade as if they did it themselves.

E CONTRA argued, It is not found that the defendant hath uttered any of these commodities in *England*, but it is found quite otherwise; that he exported English cloths to *Turkey*. At common law all trades are free, and were so till this statute, and never any construction was made of this by equity. No man will say a merchant is within it, if he buys and exports a commodity: the preamble of the statute is for husbandry, * and arts, and mysteries in *England*: the making of his cloth is here, but the merchandizing of it is abroad: this statute meddles with merchants only as to taking of apprentices, not as to the prohibiting clause of using the trade, &c. Here the end of the law is answered, that the cloth is worked and manufactured by those that have been apprentices; he hath not personally used it, nor is he within the clause of setting on work those, who have not been apprentices in the city of London. 8 Co. 130. I may exercise a trade for my private family; I may employ a man for that use; the defendant hath not done this for the sake of any trade in *England*. This statute hath been always construed strictly; as in the case of *Rotheram v. Morris* at *Shrewsbury*, a man is a mercer, and he sells hats, and the party is apprentice to him as mercer, he may use the trade of hatter, (a) (in the petty towns it is

(a) Carth. 163. Comb. 179. 1 Mod. 190. Salk. 67. Ld. Ray. 738.

usual) (b) because served to him who did so: a *wife* that hath concerned herself in the trade, may use it when a *widow*, if she lived with her husband seven years; (c) for she shall be construed within the words, to have served *as* an apprentice, though never was one. Besides, by the statute, the setting persons on work, who have not been apprentices, is another offence, and perhaps, that is an evidence of the use of a trade; but when it is found, that he only set men on work, that cannot be an using of a trade.

HOBBS
v.
YOUNG.

HOLT Chief Justice. Horner is an ancient trade for the pressing of horns, and a comb maker did press horns (d) for his own service in his own trade, and held he was within the statute. (e)

(b) 1 Mod. 26. Burr. Rep. 267.
(c) Cro. Car. 347. 516. 2 Bent. 187.
Palm. 541. 11 Co. 54. Hutt. 131.
Hob. 211. 1 Saund. 311. 2 Ld. Ray.
1248.

(d) At the assizes at Cambridge. See
3 Mod. 316.
(e) In Trinity Term the judges delivered
their opinions *seriatim*, and judgment given
for the plaintiff, post, page 226.

Rousby against Manning.

Case 151.

DEBT upon an obligation conditioned to submit to an award *ita quod* that it should be ready to be delivered to the parties, or to such as should desire it *ad vel ante*, &c. Plea "*nul tiel award*." Replication, *award*; and breach: And demurrer because doth not say it was ready to be delivered.

In debt on bond conditioned *so* | as the award be delivered to the party who desired it, it need not be averred that it was delivered.

TREMAIN cited for exception, *Jenkinson v. Allen*, 3 Keb. 513. *Roberts v. Marriott*, 2 Saund. 73. 188. both the same case, *Hunigate's case*, 5 Co. 103.

S. C. Ante, 98.
S. C. Carth. 158.
S. C. 3 Mod.

THOMPSON *e contra*, That it ought to have come on their side, that it was desired and not ready to be delivered to him.

330.
Cro. Jac. 278.
2 Mod. 77.
6 Mod. 82.
1 Ld. Ray. 115.
2 Ld. Ray. 989.
Kyd on Awards,
195.

HOLT Chief Justice. It is in writing, and therefore ready to be delivered of necessity, and so well enough: and judgment was given for the plaintiff, *vide* Cro. Jac. 577. Cro. Car. 513. *Fuller v. Lane*, 1656. in the Common Pleas, that it was an exception, but **HALE** *e contra*.

Case 152.

* Paine *against* Partidge.

* [243]

Easter Term, 2 Will. & Mary, Roll 43.

An action on the case will not lie for not keeping a ferry-boat, which by custom the defendant ought to keep, for all the inhabitants of such a place, by which the plaintiff lost his passage.

S. C. Post, 255.
S. C. 3 Mod.
289.
S. C. Salk. 12.
S. C. Comb.
280.
S. C. Carth. 191.
S. C. Holt. 6.
S. C. Ray. Ent.
439.
Co. Lit. 56. 89.
3 Roll Abr. 107.
1 Leon. 273.
9 Co. 58.
1 Lev. 262.
Cro. Eliz. 815.
2 Vern. 646.
1 Com. Dig.
129. 201.

CASE for not keeping a ferry-boat, which by custom he ought to keep for all the inhabitants, by which he lost his passage. The defendant pleads, that there was a bridge in repair. The plaintiff yet makes an idle replication. The defendant demurs. Both bar and replication agreed ill. Argued if the declaration was good.

And exception taken to it as not good for inhabitants by way of custom, but that there ought to have been a *prescription*, because it is not merely an *easement*, but an *interest*; a charge on the defendant. Now the inhabitants cannot discharge it, nor can any discharge be of it; for if all the inhabitants release it, a new one may claim it. (a) The custom is unreasonable, because not alledged as necessary, that owner or servants should attend the boat, and damage may come to it, and it is not reasonable it should be out of the defendant's possession, because he hath no recompences for it. (b) It is unlimited; it is *ad libitum*; and not limited to their necessary occasions.

CONTRA: "*Ad libitum*," is no more than *amni tempore anni quolibet anno*, and that hath been agreed good. As to its being an interest, and laying a charge on the defendant, it was answered, that it was a pure easement, and there can be no easement to one, but it must be a charge to another, as is a way over another man's ground. A custom to grind at the lord's mill, quit of toll, is the same, and yet there the lord is at the charge to keep the mill. (c) It is no new thing to lay a custom in the inhabitants for an easement; as in the case of *Baker v. Brereman*. (d) This public ferry is for the public good: suppose the king should grant a ferry with a toll from passengers, excepting the inhabitants of such a vill, this would be good, and so this might be the commencement; and concluded for the plaintiff.

HOLT Chief Justice. The great question is if any action will lie, it being like a *public nuisance*; so many having the concern in it: and he directed the counsel to argue that point. *Adjournatur*. (e)

(a) See the Year Book, 18 Edw. 4. pl. 10. and 2 Roll Rep. 289.

(b) 1 Leon. 142. 9 Co. 56.

(c) 18 Edw. 4. pl. 3.

(d) Cro. Car. 418.

(e) This case was moved again, and judgment given for the defendant. See post, 255. 257.

* Kellow against Rowden.

Case 153.

* [244]

Trinity Term, 1 Jac. 2. Roll 796:

DE B T in the *detinet* by the plaintiff, as executor of *Edward Kellow*, against the defendant, as son and heir of *John Rowden*, the elder upon a bond for one hundred and twenty pounds, wherein *John Rowden*, the father, bound him and his heirs.—The defendant pleads "*riens per discent*" from the said *John Rowden*, his father: special verdict.

THE JURY find, That the said *John Rowden* the father was seised of lands in fee simple, and had issue *John* his eldest son, and *Richard* the now defendant his second son; and so seised, made a settlement of the said lands to the use of himself for life, remainder to the use of the said *John* his eldest son in tail, and after to the use of his own right heirs: by virtue of which, and of the statute of uses, he was seised for life; remainder to *John*, his son in tail; the reversion to the said *John* the elder, and his heirs: that afterwards *John* the elder so seised, died; upon whose death the reversion descended to *John* his eldest son who entered, and was seised in possession of the estate tail, and the reversion in fee simple; *John* the son died; and upon his death the said lands descended to *John* his only son, who entered and was seised in possession of the estate tail, and reversion in fee simple, and after died without issue; and then the lands descended to the defendant, who is heir to *John* his father, and *John* his nephew: and if the defendant hath any lands by descent from *John Rowden* his father in fee simple, then they find *assets* and for the plaintiff, otherwise for the defendant.

MR. GOULD for the plaintiff. I do take it, that the issue is found with the plaintiff; for the question is, whether the defendant hath these lands from his father? and I take it, that it wholly comes from his father, and nothing from his brother, or nephew. And here I first premise, that when old *John* made the settlement, by which the estate was limited to himself for life, remainder to his son *John* in tail, and after to his own right heirs, that the estate limited to his own right heirs, creates a reversion expectant upon the estate tail, and is the old estate of old *John*, and when the father died, by which there was a descent on *John* his eldest son, the tenant in tail who then had also the reversion, these continued two several and distinct estates, and as if they had been in two several persons; and though now both in one person, there will be no difference, whether the said *Isaac* was the tenant in tail, and the said *John Kellow* tenant of the reversion: and the seisin of the estate tail will not give a seisin to make a *possessio fratris*, or to intitle an heir to the reversion, as from him. To explain this, I shall only cite

Bingham's

If A. having two sons B. and C. settle his estate on himself for life, remainder to B. in tail, remainder to his own right heirs; and B. die leaving issue who die without issue, the estate descends to C. the son of A. and shall be assets in his hands so as to charge him upon the bond of his father.

S. C. 3 Mod. 253.
S. C. 3 Lev. 286.
S. C. Carth. 126.
S. C. 3 Salk. 178.
S. C. Holt. 71. 336.
1 Roll Abr. 269, 888.
Hob. 48.
Cro. Car. 151.
Co. Lit. 374.
6 Co. 42.
1 Vern. 419.
Dyer 124.
2 Lepn. 11.
3 Lev. 286.
1 Salk. 241.
Carth. 129.
Ld. Ray. 53.
784.
1 Com. Dig. "Assets" (A.)
2 Bl. Rep. 1100.
1230.
Brown's Ch. Cases 246. & 56.

* [245]

KILLOW
v.
RICHARDSON.

Bingham's case. (a) *Robert Bingham* the grandfather, *Robert Bingham* the father, and *Richard Bingham* the son; *Robert* the grandfather was seised of a manor in fee held by *knight's service*, and by fine settled the same to the use of himself for life, remainder to his son, the father, in tail, and after to the use of his own right heirs: the father dies; the grandfather dies, by which the son within age had the estate tail, and the reversion in fee. The question was, if he should be in ward: resolved that *Robert* the grandfather had the estate expectant on the said estate tail, as a reversion, and that the son should not be in ward. For that though he had the reversion in fee, which was held of the lord, yet, in regard of the estate tail, he shall be excused; and in that case it is held, that the donee hath two distinct estates, the estate tail, and the reversion in fee; and the reversion in fee was a mesnalty between the lord and the donee: so that I infer, that the reversion is a distinct estate, and no way affected by the possession, or seisin of the estate tail, but a dry reversion in *John* and his son, expectant on their estate tail: THEN, whether this verdict will maintain this issue, which is, that the defendant hath these lands by descent from his father? I conceive it will: for the reversion being an estate independent on the estate tail, distinct from that, there is no possession or seisin as the law requires, to intitle the defendant as heir to his brother or nephew, who were only seised of the estate tail, and intitled to the reversion, but he must intitle himself to it by his father that was last actually seised. In *John's* hands it was no assets, but now it comes to the defendant's hands under a different aspect, it is assets; nor could the seisin of the estate tail make a *possessio fratris* of the reversion: this premised, I do take it, that the defendant derives his by descent from his father, and from him only, and not from his brother or nephew; and therefore we cannot charge him, but as heir to his father: and the general rule in law is, that a man who makes title by descent, must make it as heir to him that was last actually seised, or to him in whom the estate was first vested by purchase, (b) and this rule holds in things that lie in grant, as well as in livery; and therefore, where son and daughter are by one venter, and son by the other; and the father dies seised (if * of lands); to make a *possessio fratris*, there must be an entry, or other actual seisin in the brother; else the second brother of the half blood shall have it, as son and heir to the father. (c) If rent, advowson, &c. descends, then to make a *possessio fratris*, there must be a presentation to the church, or rent received: if he die before he could possibly present, or receive any rent, the brother of the half blood shall have it. (d) In that case is put the case of reversion, or remainder expectant on an estate for life, or in tail; there, he who claims the reversion as heir, ought to make himself heir to him that made the gift or lease, or to the purchaser of the reversion: this I take to be our case at bar. The defendant claims as heir; who then is donor but his

(a) 2 Co. 91.

(b) Co. Lit. 11. 239.

(c) *Ratcliff's case*, 3 Co. 41, 42.

(d) Agreed in the case of *Rose v. Master*, Cro. Car. 410.

father?

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father? therefore must claim as heir to him; and if he claim as heir to him, it is a certain consequence that we must charge him as heir to him, for if he can claim as heir to his father, *a fortiori* we may charge him so: suppose *John* the father had issue a son and a daughter by one venter, and the defendant had been a son by the second venter, had it been necessary for him to intitle himself by way of the mediate heirs, he had been gone; for the estate would have escheated, for he could not intitle himself by the sister or brother of the half blood; so greatly inconvenient would it be. (e) Upon this reason it is that if there be father and son, the son makes a lease for life, and dies, and the reversion descends to the uncle, and he dies, the reversion shall not descend to the father, but shall escheat, because he must make himself heir to the son, and not to the uncle, who had the reversion cast upon him. (f) A man hath issue two sons, and dies seised, the eldest doth not enter, but dies; the second shall have a *mortdancestor*, and make himself heir only to the father, and recover damages from the death of his father. (g) In this case, if the eldest son had made a *warranty*, these lands should not be recovered in value, where it is brought in by a fable that the heir of an heir should not be chargeable; the reason is, because he was last seised, and so heir to him. (h) OBJECTION in *Jenks's case*, *Cro. Car.* 151. The defendant, as brother and heir to J. S. issue *per discent* from his brother, found, that J. S. had issue, and died, issue died without issue, whereon the lands descended to the defendant, as heir to the son of his brother: adjudged for defendant.—Clearly that ought to be so, for there was a descent and entry; so he must be named, and no inconvenience, for there being an entry, that is notorious, and the plaintiff ought to take notice of it, but of a pedigree it is hard to take notice. In * *Buckmere's case*, (i) it is said, FIRST, as to a FORMEDON *in reverter*, to name all the pedigree of the part of the donor, or else to abate. SECONDLY, FORMEDON *in remainder*, to make himself son and heir, or cousin and heir to him, that was last seised; if the *descender*, to name the issue that survived; if entered, then son and heir; if not entered, then only son. Now it is notable, that in all these cases the naming is only form; but as to the point of descent, to derive a title, must be from him that is last seised, and that is the present case. In the case of *Frank v. Burford*, (k) if in a FORMEDON *in descender*, he make himself heir to every one, to whom the estate is descendable, good; for then he must needs be heir to all seised; but he must not fail, saith the book, to make himself heir to all that were seised.

• [247]

TREMAYNE *e contra*. He should, in this case, have declared as uncle and heir of *John*, who was son to the man who sealed the bond, and was last seised. The reversion was such an estate as might have been sold. If he had acknowledged a judgment or statute, it would have bound the heir: now if he had such an estate as he might have barred the heir from enjoying, then he ought to

(e) Co. Lit. 11.

(f) The Year Book, 5 Edw. 4. pl. 7.

(g) Co. Lit. 287.

(h) Co. Lit. 259.

(i) 8 Co. 86.

(k) Hob. 51.

have

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have so alledged it, to shew how he was heir. The defendant h
it by descent, but it is not immediate. He hath here pleaded "*rie
per descent*," and he hath nothing by descent from him. If t
action had been brought against *John*, he could have pleaded he h
only a reversion expectant on estate tail, and no more, and jud
ment ought to have been for him; nothing is more common: .
cited a case of *Spring v. Duke*, (l) and *Chappel v. Rudge* in t
Common Pleas in LORD NORTH's time, (m) where judgment w
for the defendant in a case of this nature, but it was imperfect
put, and was agreed, and so I took but little of it.

Afterward it was argued by the judges and judgment given f
the defendant by three to one.

* [248]

EYRES *Jussice*. He cannot be charged as an immediate heir; thou
I agree these lands are assets, and he is chargeable. (n) But thou
the lands be assets he cannot be charged as heir to the obligor, witho
taking notice of the elder brother, for he was seised of the reve
sion, so as to be able to charge it with a statute. In *Reve v. Malster* (
held to be a perfect descent: they were so seised, as the heir should ha
been in ward. (p) If a writ of right had been brought, they mu
have joined *the wife* upon the mere right, so that each of them w
heir. (q) Where any person claims a reversion, he must make hims
heir to him that made the first gift, as in *Ratcliff's case*; (r) and
doing so, he must make himself heir to his grandfather, &c. (s) I
must make mention of the elder brother to the father. (t) If * t
eldest son survive the father, and be omitted, the writ shall abate
as he is to intitle himself to the land, so he is to be charged
mediate heir; for in the same manner he is to be charged, that l
is to recover by: if the argument, that the obligee is a stranger to t
pedigree, were any thing, it is an argument against the setting forth
descent in case of lands descended in possession. The case in *Brook* (u)
agree to be good law, but not to affect this; for that case of t
half blood stands upon a different foundation: as suppose the fee a
freehold descend, the second son cannot intitle himself as heir to h
father, without taking notice of his brother, who survived his fathe
The true reason of the difference of the naming, or not naming t
brother of the half blood, is only upon a particular maxim of t
common law, that he must make himself heir of the whole blood, t
him that was last seised. (x) In the declaration you must shew ho
he was heir. (y) In *Jenks's case* it was held that an immedia
descent without shewing how, was naught: there is a differen
between the freehold and inheritance descending, and the reversion

(l) Not reported.

(m) Not reported.

(n) Dyer 306. Plowd. 441.

(o) Cro. Car. 412. Jones 632.

(p) Dyer 308.

(q) 40 Edw. 3. pl. 10.

(r) 3 Co. 41.

(s) F. N. B. 222.

(t) 8 Co. 88.

(u) Bro. Abr. title "Descent," 14. 30.

(x) Dyer 9. 48. Hob. 334. Cro. C.
543. Jones 457. 462. Co. Lit. 23
2 Roll Abr. 400. 402. Cro. Eliz. 2
Cro. Jac. 161.

(y) 9 Co. 21. Cro. Car. 151. 2 R.
Abr. 709. See also Carth. 126. 3 Mo
25. 3 Lev. 286. Salk. 355. Bu
N. P. 176. 300.

descendin

descending, as to this purpose; and therefore the defendant ought to have been charged as mediate heir: and so he concluded for the defendant.

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ROWDEN.

GREGORY Justice. The plaintiff ought to have his judgment. In *Jenks's case*, in *Cra. Car.* 131. the lands having descended from the father to the son were assets; it cannot be pretended to be so here; there the brother was actually seised; here the visible seisin was in *John* the son; and there was only of an estate tail; here the fee simple remained in the father: and so he concluded for the plaintiff.

DOLBIN Justice. If he have land as heir to his father, then he is well charged; if he have it, as heir to his nephew, it is otherwise: here his title is only as heir to his father, he claims nothing as heir to his nephew. In *Jenks's case*, there was a fee simple executed, and I have seen the arguments in that case on both sides, agreeing this to be as I hold: and so he concluded for the plaintiff.

HOLT Chief Justice. The action is well brought: **FIRST**, this reversion in fee which is now come into possession in the defendant *Richard*, he has as heir to his father, and it was assets only in him, it was not assets in *John* his nephew, nor in the brother; so that they were not chargeable: in the *case of Jenks*, it was assets in the eldest son, he was actually seised; now here the estate of the nephew was not chargeable. **SECONDLY**, the title which he * has now, he hath as from the father as heir to him: when he is to make his title, he need only claim as from his father; and consequently, a stranger shall do no other: suppose the defendant had been a brother of the half blood, he could not have claimed as heir to his brother, and yet he would be heir to his father: he claims from the father that was last seised: then as to that of a daughter, the answer of my **BROTHER EYRES** is, that you shall not mention him in the pedigree, because it makes against you; is that a reason? no, the reason is, because it makes nothing for you in the matter. Suppose a discontinuance, he must have brought his **FORMEDON in reverter**, as son and heir to his father. **BROTHER EYRES** says, he must shew his consinage. I say he must, if a collateral heir, and what is that? he only shews himself how heir, as son of C. son of B. &c. he need not say son and heir of him, but only shew his consinage. A son need never shew his consinage, for he is immediate heir: besides, a stranger is never to shew consinage; there is no case where it is necessary: a man may bring an action against a cousin and heir as cousin and heir, without shewing how. The title is as heir only to him that was last seised; besides, that is in a writ; this is by bill in this court, which is like a writ in the Common Pleas. As to the case of *Reeve v. Mafster*, the younger son may intitle himself as heir to his father, *Dyer* 371. the younger brother shall not make mention of the brother, but claim as heir to the father. And so he concluded for the plaintiff.

* [249]

37 Affize, pl. 4.

And judgment was accordingly given for the plaintiff. (x)

(x) See 29 Car. 2. c. 3. and 3 & 4 Will & Mary, c. 14.

Case 154.

Buxton *against* Horne.

Escape.

S. C. Ante, 174.

S. C. Holt. 279.

See 3 Com. Dig. "Escape" (E.)

ESCAPE with consent of sheriffs, without consent of plaintiff,
no bar to the plaintiff's debt on judgment.

Anonymous.

* [250] * IF a *traverse* be ill, sometimes it is helped by a *general demurrer*,
A defective tra- as if the plea be good without it, and the traverse is surplufage,
verse may be there helped by a general demurrer; because there the party may
helped by a traverse the inducement; but the want of a traverse *per* HOLT Chief
general demur- Justice, is not helped by a general demurrer. (a)
rer.
Hob. 233. 316.
Cro. Eliz. 161. *Smith v. Cole, Saund.* 206. A demurrer, because *incerta et caret*
Yelv. 122. *forma*, is a general demurrer. *V. Rolls Rep.* 264. 2 *Bulst.* 326.
Savil 87.
1 Leon. 80.
Cro. Car. 324. 3 Mod. 319. 1 Saund. 268. 2 Mod. 60. Fortef. 379. 5 Com Dig. "Pleader" (C. 22.)

(a) See 27 Eliz. c. 5. and 4 & 5 An. c. 16.

Anonymous.

Executor.

There may be an executor *de son tort* of a term.

Moor. 126. 1 Sid. 76. and see the case of the Mayor and Commonalty of Norwich v. Johnston, 3 Mod.
Rep. 90. and 1 Com. Dig. 266.

* Hilary Term,

• [251]

The Second of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.*

Sir GILES EYRES, *Knt.*

} *Justices.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

The King against Lee, Newton, and others.

Case 155.

MANDAMUS to restore to the office of PROCTOR. They make a special return, that at Doctors Commons, &c. (a)

A *proctor* is a spiritual person belonging to the ecclesiastical court, and entirely under the controul of the arches; and therefore, if he be deprived, the court of King's Bench will not

Mr. DARNELL took exceptions to it,—FIRST, That a *mandamus* lies for the office of *proctor*; for it is of a public concern. The party admitted to it takes an oath: a *mandamus* lies, because no *assize* lies, and so there is no other remedy; for he has only an action on the case, and that is but an imperfect remedy, because it is only for

grant a *mandamus* to restore him.——S. C. Ante, 217. S. C. Post. 261. S. C. 3 Lev. 309. S. C. Holt, 435. S. C. 3 Mod. 332. S. C. Carth. 169. S. C. Skin. 290. S. C. 3 Salk. 230. 1 Sid. 29. 40. 71. 1 Keb. 5. 1 Vent. 143. 6 Mod. 82. Ld. Ray. 989. Stra. 59.

(a) See the return, and the first argument in this case, post, 261; and the second argument, with the judgment of the court, ante, 217.

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Q

damages

KING
v.
LEE.

damages to be assessed by a jury and no more; there is no restitution: *Hurff's case*, Sid. 94. it lies for an attorney.

SECONDLY, Here is no power of *visitation* set forth; for either the dean of the arches and the archbishop have one and the same power, or if they are different; then the dean of the arches had no power to turn us out.

THIRDLY, It is uncertain; for it is not said that the archbishop has the power of visiting so as to restore: as it is set forth it is only in spiritual matters; here is no prescription of a right to restore, 11 Co. 99. The return ought to be certain; there are no causes set forth to justify the turning him out; no manner of right set forth to make a rate; nor any rate in particular set forth; nor when it was made. They shew no power or law to remove a proctor for non-payment of ten shillings taxed.

FOURTHLY, The statute set forth is void; for no man that has an office for life, can be turned out without prescription or charter; now that statute could only be for the better government of the proctors.

FIFTHLY, They set not forth any time when this cause was received, and then it might be before the general pardon.

SIXTHLY, They have proceeded against him without any warning or hearing of him, Sid. 14.

HOLT Chief Justice. What the dean of the arches does, the archbishop does, as what the chancellor does the bishop does.

* [252]

DOLBIN * Justice. The dean of the arches is the very archbishop; it is one and the same jurisdiction.

SOMERS Solicitor General. It is true, in point of causes, the dean of the arches act is the act and sentence of the archbishop, but here we have returned that the archbishop is visitor there, and has the government and superintendency of the proctors and officers. The steward of a court baron denied a *mandamus* (b) Granted for treasurer of the New-River water, but never determined: Moved for the clerk of the works of the city. (c) *Cook's case*, 2 Sid. 110. (which book, by DOLBIN Justice, is fit to be burned, being taken by him, when a student, and unworthily done by them that printed it.)

2 Roll Abr.
229.
1 Mod. 12.
10 Co. 31.
Noy. 91.
1 Burr. 567.
3 Atk. 662.

HOLT Chief Justice. An ecclesiastical corporation always has a visitor, and therefore you never heard of a *mandamus* moved for an abbot or a prior. Every private corporation has a visitor. But this differs from all the other cases, for he is a public person: we take notice of A PROCTOR; for our prohibitions are directed to them. Many acts of parliament mention proctors as officers: I

(b) But see 1 Sid. 40. 169. Raym. 112. 1 Lev. 123. See also 1 Term Rep. 12. 2 Lev. 18. 146. 1 Bl. Rep. 50. and 5 Com. Dig. 8vo. edit. 21.
(c) *Cock's case*, 1 Sid. 169. 2 Sid.

think it lies: and for causes of removal here are none. But the question is, whether the archbishop can be visitor of his own courts, whether we shall not leave the judges to hear and determine their own causes, and govern their own officers. It is fit to be farther considered of.

KING
v.
LEE.

EYRES Justice. The judge there is more than a deputy, for the archbishop may sue before the chancellor for a pension, and yet, in archbishop *Sheldon's case*, a prohibition was granted to a suit for library before dean of arches. *Adjournatur.* (d)

(d) The court, after a third argument, refused to grant a *mandamus*; for that a *proctor* is not a temporal officer, but a spiritual person under the controul of the ecclesiastical courts, ante, 217. post, 261.

Dye against Wells.

Case 156.

COVENANT to permit the plaintiff to carry away trees: breach *quod non permittit, sed obstruxit, et obstupavit*: held well upon demurrer; and judgment for the plaintiff.

How breach of covenant may be assigned.

Yelv. 39.

1 Sid. 30. Cro. Jac. 170. Cro. Eliz. 348. 1 Lev. 94. 2 Mod. 138. 3 Mod. 69. 4 Mod. 188. Stra. 228. 1 Ed. Ray. 620, and see the case of *Hughes v. Rickman*, Cowp. 123.

*** The King against Hill.**

Case 157.

*** [253]**

MANDAMUS: return that he was not *debito modo electus, et praefectus ad officium* of the register of archdeacon.

A return to a mandamus, that the party was not *debito modo electus*, is good.

MOVED to be ill, because it was not said positively, "*non fuit electus*," according to the case of *Crispe v. Maidstone*.

Carth. 170.
Ray. 365.
1 Sid. 210.
1 Vent. 267.
111.

THE COURT. The writ is *debito modo electus*, and the return follows it, and you may bring an action on this well enough; it is a direct answer to the writ.

Ray. 153.
1 Lev. 306.
5 Mod. 10.
Mod. Cases 89.
309.
Andrews 105.
1 Salk. 433.
12 Mod. 2.

Per HOLT Chief Justice. The register comes in by patent, and I wonder how he comes to lay in this writ an eviction: and for a deputy register, no *mandamus* lies; that is only at will.

1 Stra. 583. 2 Stra. 1235. 1 Ed. Ray. 559. 2 Ed. Ray. 1353. 2 Burr. 1013. Cowp. 413. Dougl. 79, 80. 2 Term Rep. 456.

See 9 Anne, c. 20.

* Easter Term,

• [254]

The Third of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Temple against Killingworth.

Case 158.

ACTION upon the case against the defendant for levying a
plaint in the sheriff's court in *London*, and causing the plaintiff
to be arrested thereon, *ubi revera*, the cause of action arose not with-
in the jurisdiction. On "not guilty" pleaded, a verdict for the
plaintiff, and five pounds damages assessed.

An action on
the case will not
lie for suing one
in an inferior
court, for a
cause of action,
arising without
their jurisdic-
tion; for if this
had been plead-
ed and refused
a prohibition
would have been
granted.

And moved in arrest of judgment, that the action lies not, for that
there was no malice in the case; and it was not averred, that he
was held to unreasonable bail, but barely because it accrued *extra*
jurisdictionem; and there was cited 1 *Roll. Abr.* 102; that an
action would lie for a second arrest for the same cause after a re-

S. C. Carth. 189.
Hob. 205. 1 Sid.

S. C. 12 Mod. 4. S. C. 1 Danv. 194. 1 Roll. Abr. 102. Cro. Jac. 133. 663. 667. 483. 4 Co. 14. 1 Vent. 369. 669. 1 Saund. 221. Lutw. 1570. 4 Mod. 13. 1 L. v. 292. Skin.
131. 3 Peer Wms. 104. 1 Bag. Abr. 63.

Q3

move

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v.
KILLING-
WORTH.

mover of the first plaint by an *habeas corpus*; but here is no unjust vexation, for he might have pleaded to the jurisdiction there and have had his costs; and in the case of *Bray v. Partrid*, (a) held no action lies for suit, where there is no cause of action; and it is hard that an action should lie because out of the jurisdiction, when it will not lie, though a verdict be for the defendant, and no cause of action at all. In the case of *Waterhouse v. Bawde*, (b) no action lies for suit in Spiritual Court for tithes of wood, where the statute says no tithes shall be paid.

See the case of
Rowland v.
Veale. Cowp.
18.

• [255]

Mr. TURNER argued *à contra*, That this action does lie, because here is both injury and damage, and there is the statute of Westminster the first which prohibits such suits in inferior courts; he cited *Cro. Jac.* 663. *Cro. Eliz.* 628. 836. 1 *Sid.* 424. 463. 1 *Saund.* 228. The action will not lie for a causeless suit alone, that is, because of their general jurisdiction; but here this action is for an unjust vexation. (c) The question here is, if the process be illegal; and it is so: it is all *coram non judice*. Perhaps an action will not lie against an officer, for he is justifiable, but here it is against the party. (d) The case of *Hudson v. Cock*, (e) was as this, and judgment for the plaintiff. (f.) And the practice of late has been frequent to bring actions of this nature.

(g) 2 Show. 148.
314.

HOLT Chief Justice. It is hard an action should lie. Of late the opinions have run with the action; nay in the case of *Olcut v. Bessey* (g) some held false imprisonment to lie against the gaoler. But surely it is hard that an action should lie for suing with cause, because out of the jurisdiction, and because no cause within the jurisdiction, when an action will not lie for suit on a verdict for the defendant, when there is no cause at all, neither within nor without: besides, the inferior court has jurisdiction of such a cause as this, and the law has put a plea into his mouth; and in all HALE's time, no prohibition was granted without affidavit of a plea offered. It is fit to be considered by ALL THE JUDGES, because there has been difference of opinion; let it stay *quousque*, &c.

DOLBIN Justice. It was never held to lie till NORTH's time.

(a) *Cro. Eliz.* 836.

(b) *Cro. Jac.* 133.

(c) 4 Co. 14.

(d) *Fitz. Abr.* "Estoppel," 18. 17 Hen. 6. pl. 45.

(e) Easter Term, 35 Car. 2. in the Common Pleas.

(f) See the cases of *Smith v. Fuller*, Trinity Term, 27 Car. 2. Roll 1442. B. R. and *Prickhouse v. Butler*.

Carter *against* Davis.

Case 159.

Hilary Term, 2 William & Mary, Roll 128.

CASE upon *assumpsit*. The defendant pleads in abatement. The plaintiff demurs as in bar: joinder as in bar. Upon debate **PER CURIAM** held to be a discontinuance, because the parties have put themselves upon *the court* as to plea in bar, and there is no such, and nothing said to the plea in abatement.

Demurrer in bar on a plea in abatement is a discontinuance.

S. C. Carth. 187.

S. C. Salk. 218.

Ante 155. Co. Ent. 160. 3 Mod. 281. 2 Roll Rep. 397. 1 Roll Abr. 488. 3 Lev. 223. 1 Saund. 286. 2 Saund. 380. Ld. Ray. 1482. 1 Wilf. 302. 2 Wilf. 85. 5 Com. Dig. "Pleader" (Q.3.)

Payne *against* Partridge.

Case 160.

Easter Term, 2 Will. & Mary, Roll 43.

ACTION on the case by the plaintiff as an inhabitant of a *vill*, in which the defendant, by custom, was *used* to keep a ferry-boat for all the inhabitants of the said vill toll-free, and all other persons, &c. That the defendant did not, &c. by which the plaintiff could not pass in and about his necessary affairs. Plea; replication; and demurrer. Divers exceptions taken to the bar and replication. But at last by direction of the court, the insufficiency of the count was argued.

A custom that the inhabitants of a particular district have used and have a right to pass a certain ferry toll-free is good; and if toll be extorted from such an inhabitant he may have an action on the case; but no action will lie against the ferryman for not keeping a boat for the purpose of the ferry, unless some special damage ensue. But he may be indicted for this neglect; and it will be no excuse that he has erected a bridge across the river for a common passage, which is more convenient than the ferry.

TREMAINE Serjeant. It is not said that he *ought*, but only *used* to keep. The chief thing is, that the plaintiff cannot maintain this action, for he says, all the king's subjects have used and might pass thereby over, &c. and here is no particular damage, and therefore an *indictment* only lies; for every man in the kingdom might then have this action, which would be infinite and vexatious; he cited 27 Hen. 8. pl. 27. Co. Lit. 56. Cro. Eliz. 664. Fenwick v. Hewden, Moore 108. Williams's case, 5 Co. 72. Boulton's case, 5 Co. 104.

POWIS *e contra*, That this is brought as an inhabitant, * he cited 1 Cro. 266, 267. Cro. Jac. 555. 557. That this is not such an action as every subject might have; it is founded on the usage of a particular town, and none but an inhabitant of an ancient messuage of that town can bring such an action as this. (a) The inhabitants were to have a more particular benefit than others, for they were to pay no toll: we have shewn that we did come and request; this is brought upon the demand.

S. C. Ante 243.
S. C. 3 Mod.

289. S. C. Salk. 12. S. C. Comb. 180. S. C. Carth. 191. S. C. Holt, 6. S. C. Ray. Ent. 439. Co. Lit. 56. 2 Roll Rep. 289. Co. Lit. 89. 1 Leon. 273. Cro. Car. 418. 1 Com. Dig. 203. 5 Com. Dig. 223. 1 Ld. Ray. 486. 2 Bl. Com. 219. 2 Wilf. 58. 2 Term Rep. 669.

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(a) Brook Abr. title "Action sur case," 6.

Q4

In

PAYNE
v.
PARTRIDGE.

In the Trinity Term following it was argued by THE JUDGES.

See Grimstead
v. Marlowe, 4
Term Rep. 717.

EYRES *Justice*. This custom is well alledged, both as to matter and manner. In all customs, there must be usage and reasonableness. (b) That may be reasonable in one place *ratione loci*, which is not so in another. (c) It is a good custom, that one man should have the sole profit of such a ferry; the defendant is not charged without a recompence; and yet if he were, it is well enough, as 1 Roll Abr. 216. Cro. Car. 419. Passage is of public necessity; it is well enough alledged for the manner to go *ad libitum suum*; and so is *Gatewood's case*, 3 Eliz. 441, 664. The defendant's plea is ill, for it is as bad as to justify the stopping a way by setting out another; and yet I think, judgment ought to be for the defendant, for by the declaration this is acknowledged to be a common passage for all the king's subjects, and so is no other than a common highway, and if one may bring an action, another, and every one may, which the law abhors. (d) The true difference is, where there is no other remedy; but here is another by *indictment* at the suit of the king, because it is a common passage, as every public river is; it is a public street. (e) The defendant is as much indictable for not keeping his ferry, as he is for not repairing an highway to which, he is obliged *ratione tenuræ*: and therefore judgment ought to be for the defendant.

GREGORY *Justice* of the same opinion. This is an *easement*, and therefore the custom is good. (f) But the action lies not because it is common to every one; and the plaintiff has laid no particular prejudice by it to himself.

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HOLT *Chief Justice*. The first question is this, whether this be a good custom, that the inhabitants of a *vill* are intitled to pass in a ferry without paying of toll. SECONDLY, If the plea be good, that he has built a bridge over, which is more convenient. THIRDLY, If the action lies at all. I am of opinion that this is a good custom: it has been held in the Common Pleas, that it is not a good custom; but that it is good let us consider, that this custom does not consist in charging him with a ferry: that there was an ancient * ferry here, is only an inducement; the keeping of the boat is not part of the custom, but it is an incident to the keeping of the ferry; the custom does not consist in having a right of passage: for there being an ancient ferry, all the king's people are intitled to pass of common right. If a ferry were granted at this day, he that accepts such grant, is bound to keep a boat for the public good: this custom is barely by way of discharge, for it is only to be eased of toll, and so is *Gatewood's case*. (g) The inhabitants of a *vill* may prescribe to a discharge. (h) The true

(b) *Gatewood's case*, 6 Co. 1. 1 Leon. 142. Co. Lit. 114. *Shaftoe's case*, 1 Sid. 267. Davis, 32. Cro. Eliz. 146. 1 Roll Abr. 560.

(c) 12 Hen. 8. pl. 5.

(d) *Williams's case*, 5 Co. 73. Co. Lit. 56. Cro. Eliz. 664. Moore 180. 2 Term Rep. 669.

(e) 13 Co. 33. 2 Inst. 30. Cro. Car. 132. 1 Ld. Ray. 486.

(f) 15 Edw. 4. pl. 29.

(g) Cro. Car. 418. See 1 Ld. Ray. 405. 4 Term Rep. 717.

(h) 18 Edw. 4. pl. 3.

custom

custom here, is only to pass without toll; what they claim, is only a discharge, a freedom from payment of what the rest of the king's subjects pay: this is reasonable, for the custom does not charge the defendant to keep the boat: besides here he has a recompence, as he receives the profits from all others, though he has none from these. (i) This custom might have a reasonable beginning by agreement, as that the inhabitants of the town might be at the charge of procuring the grant; and in consideration thereof, one man should find the boat, and enjoy the toll, but the inhabitants to pay none; and such agreement would be good at this day: it is part of his interest, his interest is incumbered with this discharge. (k)

SECONDLY, As to the plea, that he had erected a bridge cross the river for common passage, that is an ill plea: the erecting of a bridge is a voluntary act, and he may pull it down again. It is not in the power of a man to discharge himself by any act that he can do: if he had petitioned the king for a patent to destroy his ferry, and in consideration thereof, he would erect a bridge at his own charge, and repair it, and this found upon an *ad quod damnum* to be for the public good, this had been somewhat, but he cannot do it of himself.

THIRDLY, As to the action: it lies not; because the inhabitants have no more damage than all the king's subjects. (l) This right of passage is not vested in him as an inhabitant there, but as a subject; for as an inhabitant, he is only freed from toll. Here is another remedy: the 22 Hen. 6. pl. 14. is express, that it is a forfeiture, and he is indictable for it. He that has a new ferry by grant, when he accepts of it, charges himself with the repairs, and keeping it. If there had been particular damage, as if he had come over, and toll were extorted, he might have had an action. (m) So he might, if damnified for want of repairs; but not by a general obstruction, which is a common nuisance. And therefore judgment for the defendant.

* HOLT Chief Justice, the next day, declared DOLBIN's opinion to be the same *in omnibus*, * [258]

Suppose A. lays damage by loss of a market, having a carriage ready brought to the place: *quare*, if an action will lie?

(i) Crm. Eliz. 509.

(k) 1 Roll Abr. 559,

(l) See the case of Ruffel v. the Men of Devon, 2 Term Rep. 667.

(m) Natura Brevium, 94.

Case 161. The King against the Mayor and Aldermen of Exon.

If an alderman withdraw with his family from the city, without an intention of returning, and to such a distance as unavoidably prevents him from discharging the duties of his office, it is a good cause of removal; but he must be previously summoned and have particular notice to answer the causes of such removal; and if either for want of such summons, or in any other way, he is illegally removed, a *mandamus* lies to restore him.

S. C. Post. 364.
S. C. 4 Mod.

35.
S. C. Comb.
197.
S. C. Holt 169.

435.
S. C. 12 Mod.
27. 251.

11 Co. 99.
Vent. 19.

2 Roll Abr. 455.
1 Roll Rep. 409.

2 Roll Rep. 11.
Stiles, 151. 447.

Carth. 174.

Salk. 428.

1 Burr. 517.

2 Burr. 723.

4 Burr. 2087.

4 Mod. 37.

Annaly's Rep. 255.

Str. 385. 1051.

3 Com. Dig. 408, 409.

Ld. Ray. 225. 1233.

Cowp. 523.

Dougl. 177.

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MANDAMUS at the instance of *William Glyde*, to restore him to the office of ALDERMAN, &c. Return, that he departed from the city, and lived at *Topsham*; that there were several courts, and he came not to them though summoned; that he was thereupon removed for such his absence, and neglect of his duty, viz. such a day; and further, that he took not the oaths before the first day of August, 1689.

TREBY *Attorney General*, excepted to the return, that there was no notice to him, nor summons to be heard concerning his absence; for the same might be upon reasonable cause, and then it was no cause of removal; and he ought to have been summoned to answer that particular thing, and a general summons to meet at the court, is not sufficient. Then, as to his not taking the oaths, it appears by the former part of the return, that he was moved by act of court; so that at this time he was not to take the oaths, for he was actually out of the place: the statute 1 *Will. & Mary*, c. 8. requires that every man, having an office, shall take the oaths. (a) Now the question is, if *Mr. Glyde* had, or held this office at that time. The word "having" supposes possession, as on the statute of 32 *Hen. 8*. c. 1. of wills; a will by a disseisee is void. One that is removed by order of court (though illegally) till restored, is out of the office, according to the equity of the statute of 25 *Car. 2*. c. 2. which is the foundation of this. It seems to be the meaning of that act, that persons out of place should take it so soon as the disability was removed. As to the proviso for infants, &c. that seems to be but a reasonable declaration of the common law, and would have been so, if the proviso had not been made.

HOLT *Chief Justice* seemed of opinion, that an alderman's going and living out of the city, in another place, is a good cause of removal; and that he ceasing to be an inhabitant, they might remove him without summons. (b) But the rest inclined, that a summons was necessary.

The next term argued by PRATT, that the return was ill. FIRST, it must be admitted that a *mandamus* lies. Then here is no cause of removal: as to absence, *non constat* that *Topsham* is out of the liberties of the city, though it be out of the city and county of

(a) See post, *Rex v. the City of London*, page 240. notis.

(b) Absence from four occasional great courts, and one upon a stated day, where no personal notice is given when presence is not necessary, when no particular business is obstructed by absence, is not cause of motion, *Rex v. Richardson*, 1 Burr. 517.

An alderman with his family having left the borough for *four months* is not a good cause of removal, *Rex v. Mayor of Leicester*, 4 Burr. 2087. But where non residence is a good ground of motion, it is not necessary to summon him to come and reside previous to the proceedings to remove him, Dougl. 149 to 160.

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the said city, for the liberties may extend further. It is not said how long he absented himself, it might only be for a week, or the like. It is not said that his removal was without a reasonable cause, and it might be for a public, or family sickness. The omissions are alleged too general, that he did neglect his duty, and do not show how. (c) It appears, there was always a major part present, and consequently his absence no forfeiture, because no want of it. (d) It does not appear that there was any business to be done at any of the courts, or that any damage accrued to the city by his absence. It does not appear that there were no other courts held, or that these were all the courts, so that he might be frequently present. Besides, they have not *summoned* him to answer particularly for this matter. (e) Then, as to the not taking the oaths, he was not within the intention of the act, which was only for persons having offices: it appears that he was removed even before the making of this act, consequently he was not a person having an office; for this was a good judgment till disallowed by this court: that court had a jurisdiction; the removal was not void, but voidable. (f) There was no danger from those that were out of their offices. The end of the act was to secure the government from those that were then in office. Besides, they are to be suspended, and they could not be suspended, unless they were in possession, for that supposes a possession.

TREMAINE *e contra* cited *Co. Lit.* 232. and urged, that a removal for absence is reasonable, because it is fit the office should be supplied, and another put into it, lest there should be a failure of justice. Summons is not necessary in case of absence, because he deserts, and we know not where to find him. Then for the oaths, it must be a forfeiture, otherwise here will be an officer which shall never take the oaths to the present government, for there is no means to compel him to take them after his re-admission; and therefore, having an office, doth, and must mean a right to the possession. If a restitution be now awarded, he comes in upon his old title; there is no election for it; and he must be restored, if at all, to his ancient right.

* HOLT *Chief Justice*, As to summons, you take notice where he lives, so as to summon him to come to court; by the same notice you might have summoned him to answer. (g) Then for the other

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(c) Freeman's case, Cro. Car. 579.

(d) 9 Co. 50.

(e) See the case of *Rex v. Chalk*, 1 Ld. Ray. 225. Salk. 428. and reported more at large 5 Mod. 254. 257. that the disfranchisement of a corporator is good if he was heard in his defence, although he was not summoned to make it. See also *Rex v. Mayor of Liverpool*, 2 Burr. 371. But in the case of *Rex v. Mayor of Ax-*

bridge, Cowp. 523. where a *mandamus* was applied for to restore a town clerk, on the ground that he had been removed without notice to appear and defend himself, the court refused the writ, because it was admitted that there was sufficient cause for the motion.

(f) 8 Affize, pl. 18.

(g) Vide ante, page 258. note (b)

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part he is actually out (b); upon the restitution by the *mandamus*, he is admitted *de novo*. (i) Why should he not take the new oaths upon that admiffion?

But CUR. *advifare vult.* (k)

(b) A corporate office does not become *ipfo facto* vacant by the non-refidence of a corporator: it may be a forfeiture; but the corporator does not lose his franchise till a fentence of amotion has been pronounced, Rex v. Heaven, 2 Term Rep. 772.

(i) See Cowp. 503.

(k) The *peremptory mandamus* was denied, TYRE, GREGORY, and DOLBIN *Jufices*

being of opinion that there was a good caufe of removal returned, viz. his own removal with his family to live at *Topbam*. But HOLT *Chief Jufice*, although he agreed that frequent abfence, or defection from the city, is a good caufe of amotion, was of opinion that the *peremptory mandamus* ought to go, becaufe he had been removed without being fummoned. See poft, 366.

* Trinity Term,

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The Third of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King *against* Lever.

Case 162.

JUDGMENT on indictment of barrettry: error; and reversal.

Held **PER CURIAM** on motion, that no writ of restitution lies to a stranger to the record.

And by **HOLT Chief Justice** if it did, it must be by *scire facias*; and so was it in the case of *Vesey v. Harris*, *Cro. Car.* 328.

A stranger to the record cannot have *restitution* on judgment reversed as error, without a *scire facias*.

S. C. 2 Lev. 223.
S. C. 3 Keb.

2 C. 2 Salk. 587. S. C. Comb. 47. 58. S. C. Skin. 32. S. C. Trem. 320. 1 Roll Abr. 776. *Cro. Jac.* 693. 4 Mod. 161. Salk. 588.

The

Case 163.

The King against Oxenden.

A *proctor* in Doctor's Commons who receives a cause without the advice of an *advocate*, or who refuses to pay his dues to the society may be denied audience, and can only appeal to the archbishop of Canterbury, or, during the vacancy of the see, to the dean and chapter of that cathedral, as *visitors* of the court of the arches, to be restored; for he cannot have a *mandamus* at common law.

S. C. Ante, 217.

251.

S. C. 3 Lev. 309.

S. C. Holt, 435.

S. C. 3 Mod.

332.

S. C. Carth. 169.

S. C. Skin. 290.

S. C. 3 Salk.

230.

1 Roll. Abr.

526.

8 Mod. 27. 267.

10 Mod. 262.

11 Mod. 174.

12 Mod. 236.

666.

Fitzg. 123.

Str. 58.

Ld. Ray. 959.

* [262]

MANDAMUS to restore *Lee* to the office of *proctor* in the arches. They return, that the court of *Canterbury* of THE ARCHES, *London*, is an ancient ecclesiastical court, and the supreme consistory of the archbishop's see. That the archbishop for the time being, time out of mind, had and used to have the government and regulation of the judges, advocates, proctors, and other officers and ministers of that court, and from time to time hath made statutes and ordinances for their better government, as often as need required: that every person, admitted to be a *proctor* in that court, takes an oath before the judge of that court, to observe the statutes and ordinances of that court: that *Lee* took that oath: that an ordinance was made by ARCHBISHOP ARUNDELL, that no proctor should receive any cause without counsel of some advocate *sub poena remotionis*: that the said court, and other courts, are held *in quodam hospitio*, called DOCTOR'S COMMONS, in which the judges, and divers advocates, proctors, and other officers attending that court, do reside: that the public charges and expences of the said house, are borne by the said persons, and therefore they have usually made rates for the same: that *Lee* refused to pay ten shillings rated upon him: that he, as *proctor*, did receive a cause without advice of an advocate, and for that cause he was denied audience: that the archbishop for the time being, and in vacancy of the see, the dean and chapter of the cathedral church of *Canterbury* guardians of the spiritualities, time out of mind, were VISITORS of the said court of THE ARCHES, and have heard and determined all appeals and complaints of all PROCTORS, and other officers of the said court of THE ARCHES, and the same have reformed all grievances committed by the judges of the said court of THE ARCHES, upon the proctors, or other officers unduly inflicted: that the dean and chapter were at the time of denying audience to the said *Lee*, and ever since guardians of the spiritualities, and have full power and authority to hear and determine all such complaints: that *Lee* hath neither submitted himself to that court, nor appealed to the said, &c.

Mr. DOLBIN argued for *Lee*, that the return was insufficient: that it doth not say, that at the time of the tax, *Lee* was a member of the society; and no just power set forth to impose such tax; nor is the non-payment of such a sum any misbehaviour in his office. As to the objection, that the archbishop is a *visitor*, it seems hard what is meant by a visitor of a court; if they mean of DOCTOR'S COMMONS, that is a voluntary society, and of that there can be no visitor; it is not like a college, where the founder appoints a visitor: in voluntary societies, there is no founder, but consent: if they mean it only as to THE ARCHES, that the archbishop hath superintendency of the judicial acts of the court, can there be a visitor of a court? It must be a court that controuls only, and examines errors; a visitor belongs

belongs *ad loca pia*; if they mean any thing, it must be a superiority of court; now if THE ARCHES be (as the return says) the supreme court of that see, how can the archbishop be superior to it? It is impossible it should be as they say; for if he have the original jurisdiction, he cannot have it by way of appeal. Now by this return it appears, that the archbishop hath the government of THE PROCTORS, and consequently an original and primary power; and consequently cannot have it upon appeal. The very name and nature of the court imports it to be the archbishop's court; and him to be judge thereof; for it is to receive and determine appeals from the bishops in their provinces. The meaning of the statute 23 Hen. 8. c. 9. which restrains citations out of the dioceses, is that the dean of the arches is but the archbishop's substitute, as in *Trotter's case*, 8 Co. (a.) The act of the commissary is the act of the bishop; here *Lee* is removed, by the archbishop himself: there was a prohibition * granted to a suit there (at the instance of archbishop *Shelden's* executors) for a legacy given to the successor, of books, because the archbishop was judge himself, and might sit when he pleased.

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TREBY *Attorney General e contra*. No *mandamus* doth lie. These are not very ancient; I think, *Bagg's case* (b) is the foundation of them all. (c.) They shall issue in all cases that concern the public administration of justice, but they have descended too low, even to clerks of parishes; but therein the judges have not generally agreed: the proctor's business is only in the spiritual court; you take notice of it so far, as to enquire into the bounds of their jurisdiction; but you never enquire into what they do amongst themselves: it doth not appear judicially to your lordship, whether he hath an estate at will, or freehold, or other fixed estate. Then for the matter of the return, call the archbishop, visitor, or what you will, we have declared his authority, let his name be otherwise. Here is a person that has authority to examine and redress upon appeals. In all times the proctors have been governed by the archbishops. A *mandamus* is an extraordinary remedy, and not to be granted where there is any other remedy; and we have shown another way for relief. This matter is most proper to be determined by them in their own courts.

BUT THE COURT thought it an idle return, that it was THE ARCHBISHOP'S COURT, and he no visitor: but only doubted, if a *mandamus* lay, and therefore ordered another argument as to that point. (d.)

(a) See 24 Hen. 8. c. 12. f. 6. Dyer 209. 4 Mod. 116.

(b) But see 1 Lev. 23. Palm. 51. Dyer 333. Skin. 293. 3 Bac. Abr. 528.

(c) 11 Co. 94. 1 Roll. Rep. 173.

(d) This point was argued by Sir B. Shower; but the court was unanimously of opinion that a *mandamus* does not lie in this case. Ante, 217. and in S. C. 3

Mod. 335. The court are said to have been of opinion that the arches have an original and independent jurisdiction, like all other courts, over its own officers; that the judges there are the proper persons to censure them for misbehaviour; and that if they should be mistaken yet the king's courts cannot relieve. S. C. Carth. 170.

Case 164. The King against the Mayor and Aldermen of London

In *quo warranto*, a judgment of seizure against the liberties of a corporation does not dissolve the *body politic*, or render the subsequent acts of the members of the corporation void; and therefore if an act of parliament, passed after such judgment and seizure, order "that every person then having any office or employment to take certain oaths within a limited time, or that such office and employment shall be void," an alderman of a corporation so seized into the king's hands

forfeits his office by neglecting to take the oaths within the time. — S. C. Post. 274. S. C. 4 Mod. 32. S. C. Carth. 217. S. C. Skin. 293. 310. S. C. Holt. 168. 310. S. C. 12 Mod. 17. 1 Bac. Abr. 510

* [264]

MANDAMUS to restore *Sir James Smith* to the office of AN ALDERMAN of the city of *London*, to which he had been duly chosen and preferred, according to the custom of the said city used and approved. They return, that *Sir James Smith*, on the thirteenth February, 1688, was one of the *aldermen* of the city of *London*, to that place and office, according to the custom of the said city, before that time duly elected and preferred; and from the said thirteenth February, 1688, to the first of August following, remained one of the aldermen: that at the time of making the act, for abrogating the oaths, &c. (a) and continually afterwards he had and enjoyed the said office till the first of August: that at * any time before the said first of August 1689, he did not take the oaths by the said act prescribed; but to take them before the said first of August he did altogether neglect; whereby, by virtue of the said act, the said office became void; and that the said *James Smith* at any time after the neglect, was never elected into the office of one of the aldermen; and therefore they cannot restore him.

SIR ROBERT SAWYER argued against the return, that the *mandamus* is not to be restored to the place he enjoyed in 1688; but to the office he enjoyed according to the custom of the city, before the judgment in the *quo warranto*. (b) The act for restoring the city franchises is, that he take the oath the next term after his restitution; by that act all officers are restored. (c)

(a) By 1 Will. & Mary, sess. 1. c. 8. s. 6. it is enacted, "that if any person now having any office or employment civil or military, shall neglect or refuse to take the said oaths before 1 August 1689, or sooner if required by the privy council, the said office and employment of every person so neglecting or refusing shall be void."

(b) This information was brought in the 33 Car. 2; and in Trinity Term, 34 & 35 Car. 2. judgment was given for the king that the corporation was dissolved, and the franchise be seized in the king's hands, 2 Show. 263 to 279. 3 State Trials, 545 to 630. 6 State Trials, appendix, page 16. but the judgment was never recorded. 1 Bac. Abr. 510. notis. King Charles the second granted new charters; but on the 6 October 1688, James the second restored the charter to the metropolis, according to the ancient constitution. 3 State Trials, 628. and by the statute 2 Will. &

Mary, sess. 1. c. 8. "the said judgment and all and every other judgment given or recorded for seizing the liberties, &c. of *London* is reversed, annulled, and made void, and the liberties regranted to the members of the corporation." And in the case of *Neuiling v. Francis*, Easter Term, 29 Geo. 3. it is held that the proclamation of James the second for restoring corporations to their ancient charters operates, when accepted, as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Charles the Second, who had granted new charters, and overturns such new charters, 3 Term Rep. 189. See also *Rex v. Amery*.

(c) By 2 Will. & Mary, c. 8. s. 12. "that all persons so to be restored and continued shall take the oaths appointed by 1 Will. & Mary, sess. 1. c. 8. the next term after such restitution, under the penalties forfeitures, disabilities, and incapacities in the said act provided and appointed."

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SIR FRANCIS PEMBERTON, *ex eadem parte*. There are three things of consideration, FIRST, the act for abrogating the oaths. SECONDLY, the city act. THIRDLY, the return to this *mandamus*. FIRST, the act for abrogating the oaths requires no body to take the oath, but those that then were in possession of their office, or should be admitted to an office; one of the clauses is "in actual possession of an office," the other is "such as should be admitted." If a man had an office in *possession*, and another a right to it in *reversion*, and did not take the oaths, he only lost that office, which he was in possession of. There was a judgment in a *quo warranto*, in the thirty-fifth year of Charles the second whereby all the privileges of the city were taken away. Now Sir James Smith was duly elected when the corporation was in being; for it appears by the return, that he was *ante tunc debite electus* according to the custom of the city, so that must be before *the judgment*, for he could not be duly chosen according to the custom after the judgment. By the judgment in the *quo warranto* Sir James Smith ceased to be an alderman, for the corporation was dissolved; and a man cannot be an alderman of a corporation that has not a being: after this judgment there were new charters granted, as appears by the city act. It appears that he was an alderman by the charter of KING JAMES, for it is said in the return, that he was an alderman from thirteenth February 1688, to the first of August 1689. The reversal restores all the officers as they were when the judgment was given; by the reversal all the aldermen were restored that were living. (d) There is a particular time given by this act of reversal (e) for taking the oaths by those that were restored: viz. that all who were restored should take the oaths the next term after that act of parliament, and that was in Trinity Term that year. Now, having premised this, Sir James Smith was an alderman duly elected before *the judgment*; by the judgment he ceased to be an alderman; and afterwards, upon an incorporation by Charles the second, he was made an alderman again, and remained so till the first of August. By the act for abrogating the oaths, he was obliged under the penalty of the loss of his office, which he held, to take the oaths by the first of August. Then the city act of reversal restores him to the office, which he had at the time of the judgment, and there is nothing that hinders him from being restored: the reason which they give in the return is, that being an alderman, he did not take the oaths: this is no reason; for though it should be granted that it is a *forfeiture*, it is only of that which he then had; it is under forfeiture of such office, and that must be intended the office which required him to take the oaths: you will not extend it further than that which he had in actual possession: he was not obliged to take the oaths in respect of his office under the first corporation; he had no such office; he had

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(d) See the case of Newling v. Francis, 3 Term Rep. 189. and note (a) S. C.

post, 274.

(e) 2 Will. & Mary, c. 3. s. 13.

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neither *jus in re* nor *jus ad rem*: suppose he had stood as he did under that old corporation, and had no new office, I think no body will say he was obliged to take the oaths at all: the objection, that the eighth paragraph excepts him, I answer; that *Sir James Smith* is not at all within this paragraph, and if the first clause did not extend to him, (for he needed no confirmation) then the exception doth not extend to him; by the body of the act he is restored, and he stood in no need of confirmation: the confirming clause was designed for those who had bought their places, and to confirm these present officers, those that were old ones were restored, and those that were new ones were confirmed. The office of alderman could not be surrendered during the force of the judgment, for there was no such office in being: this exception can reach only to those that were confirmed, which were those that went from hand to hand. Suppose this clause be taken to comprehend all, *Sir James Smith* had nothing whereby to disable himself from being restored, and if he were not disabled, he is restored: in rigour he hath forfeited the office which he had, but shall the not taking the oaths disable him from taking a new office.

SOMERS *Solicitor General*. There is a great difference between a right to the possession, and a right in reversion; the clause of confirmation seems to qualify the force of the first reversal, *Sir James Smith* was excepted, and so removed.—In truth Mr. SOLICITOR was unprepared, and so made little answer.

* [266]

* HOLT *Chief Justice*. I must own, that when last spoke to, I did not understand this case, nor what was intended in the argument; but it now appears to have weight in it. By the act of reversal, we are to take notice that there was a judgment, and therefore that they were deprived of all their liberties by such judgment: you do not, Mr. SOLICITOR, answer the writ, for that is to be restored to a legal aldermanship, chosen by custom. Now that he could not have the thirteenth February 1688; he had no right to an action. The mayor, commonalty, and citizens had a right, but *Sir James Smith* had no right, he could bring no action: an alderman is an officer within the confirming clause, but that doth not reach this case. (f)

(f) See S. C. post, 274.

Hobbs, *qui tam*, &c. against Young.

Cafe 165.

Hilary Term, 1 & 2 Will. and Mary, Roll 129.

See this case ante, page 241.

THE COURT now *seriatim* delivered their opinions.

EYRES *Justice* for the plaintiff. That this is a setting up and exercising of a trade within the statute; which he took to be a politic law for the accustoming men to labour and industry in their youth. At common law every man might have exercised what trade he pleased: whether a private custom for exercising a trade be taken away by this statute, hath been a question; but I confess the better opinion seems to be that it is not. *Cro. Car.* 347. 516. 1 *Saund.* 312. 2 *Bull.* 191. Here the act is negative, and in the general, and reaches to all: the trade of a cloth-worker is exercised in the defendant's house, and must be exercised by some body; and the exercise of it by journeymen and master workmen, or an overseer for hire, is not an exercise of it by them, but by him that employs them; he provided them materials and tools, and paid them wages: by law he is esteemed the trader who is to run the loss and hazard; the whole managery was to be for his profit, and the workmen were to have no advantage but their wages. The widow of a tradesman cannot use her husband's trade unless she is impowered by some custom, or has really served as an apprentice. *Noy.* 5 *Hutt.* 132. *Palm.* 172. 393. 528. (see *Rolls v. Sholey*, all the arguments; and *quære* in that case: suppose that using an apprentice in a trade, was an exercise of the trade.) I do agree that the private exercise of a trade for the use of a man's family is not prohibited, it is only a private service, but if not confined to the use of his family, it is within the statute, 8 *Co.* 130. *Hob.* 211. 11 *Co.* 54. As to his exporting the cloth, he is not indicted for using the trade of a merchant; the exercise of making and working * cloth is the offence; and the exporting of it afterwards cannot purge that offence. And so he concluded for the plaintiff.

GREGORY *Justice ad idem*. The buying of cloth, and the setting of workmen at work in his house, is the exercise of the trade. It was all for his advantage; it is the master driving of a trade by the hands of a servant; the overseer and master workman is as much his servant as any other. A man may use a trade by another's hands, as in 1 *Jac.* 1. c. 22. is implied, when it is said, "that if any man by himself, or by any other, &c." And that shews it was their sense it might be managed by others. In case of a goldsmith, though he never works at it, yet his selling makes him an user of

If a merchant hire cloth-workers and dyers for the sole purpose of manufacturing and dying woolen cloths to export abroad in the way of trade, he is liable to an action on 5 *Eliz.* c. 4. §. 31. for using the trade of a *clotbier* not having been apprentice to that trade; although he keeps masters to superintend the manufacture, and all the journeymen employed in it have served regular apprenticeships to their respective trades; for it is the merchant who is the trader.

S. C. Ante, 241.
S. C. 2 *Salk.* 610.
S. C. 3 *Mod.* 313.
S. C. Comb. 179.
S. C. Carth. 162.
S. C. Holt. 66.
8 *Co.* 130.
2 *Roll Rep.* 391.
Palm. 396.
Noy. 133.
Cro. El. 872.
Cro. Car. 517.
1 *Sid.* 303.
1 *Saund.* 10.
6 *Mod.* 21.
1 *Salk.* 611.
613.
1 *Burr.* 2.
"Trade" (*D. 5.*)

2 *Burr.* 1053. 4 *Burr.* 2449. 3 *Bac. Abr.* 553. 5 *Com. Dig.*

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that trade, 2 *Bulst.* 187. The design of this statute was to encourage them who had been apprentices. These goods are bought by him to merchandize withal, not for the use of his family. It is not like the undertaking to build an house, and employing tradesmen for that purpose; that is not within the statute.

DOLBIN *Justice* for the defendant. He is not within the words of the statute: the trade of a cloth-worker is a manual occupation, for he runs no hazard, he incurs no loss, he neither buys nor sells, he is only paid for dressing the cloth, and so he is here: the master workman is the man that exercises the trade. If he had employed these workmen for the working and dressing of cloth for other men, it might have been somewhat, but these journeymen here have their hire for working the defendant's own cloth: in the other case it is but an handicraft, for hire, and here they have it: he employs cloth-workers bred apprentices, and gives them good wages, and they have no more than if they had worked in their own houses. It is the interest of the clothworkers only to work for hire, and he is not concerned for any thing else: the merchant is concerned for the benefit and honour of the commodity; it is no damage to private labouring persons; and is for the companies interest: it no ways influences or affects me at all.

HOLT *Chief Justice* for the plaintiff. He doth exercise the trade of a clothworker; he employs men only as journeymen, and not as principal workmen in the trade; the master workman is employed only as a servant: then the question is, whether it be lawful for a merchant to manufacture his own commodity: now he that uses one trade cannot use the trade of another for or about the commodity used in his own trade; a coachmaker cannot make the wheels for his own coaches; a wheel-right cannot use the trade of a smith. Here the defendant hath the same profit as if he worked himself; he receives * a benefit and allowance from the party to whom he sells the commodity; he doth receive the gain belonging to another trade. *Noy* 133. *Hunton v. Moore*, there it was adjudged for the defendant, because the dying was a part of the felt-maker's trade, and so used anciently. A comb-maker was sued for exercising the trade of an horner: the proof was, that he prest horns to make them fit for combs; and yet held, that he did exercise the trade of an horner. If the defendant, being a merchant, had wrought his own cloth, he would have been within it; and then his employing journeymen, is the same thing; for the journeyman is not the tradesman, and therefore he that employs him, must be so: he receives the profit; though he be not paid by another in particular for this, yet he receives the profits, and runs all the hazard; the workmen have but their hire agreed upon. The words of the statute are not confined to personal handicrafts: the words are "*sitting up*," and that may be by others, without working in it a man's self. The contrary opinion would discourage many who have great families; for they could not have that profit, as if they did the work themselves for the common rates, &c. Suppose a merchant

See the case of
Beach qui tam
Turner, 4 Burr.
2449.

merchant that would transport shoes, and he should buy leather; and employ journeymen to make them; this man certainly uses the trade of a shoe-maker, though the shoes were never sold here, but transported: the intendment of law is, that he hath no skill; and consequently the end of the statute is avoided,

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Judgment for the plaintiff.

Newton *against* Trigg.

Cafe 166.

See this *Cafe*, ante, page 96.

THE COURT *seriatim* now delivered their opinions.

EYRES *Justice* for the plaintiff. The question is, if an inn-keeper may be a bankrupt? I am of opinion, that neither of these matters, nor altogether, can make him a bankrupt; as to the share in the ship, that is nothing; though it be found that he had a stock to trade with in *potentia*; yet if not so in fact, it will not make him a bankrupt, *Sid.* 411. *Cro. Car.* 282. Being a merchant, and giving over his trade before the debts contracted, will exempt him out of the statute, much more if he had only a stock, and never did trade at all. Then for his being an inn-keeper, and buying all that he vends in his house. Inns are of necessity; the keeper is chargeable to the public, and compellable to lodge all comers, 2 *Rolls Rep.* 345. he cannot refuse whom he pleases, *Hutt.* 100. The case in 2 *Rolls Abr.* 84. • I think good law. Inn-keepers are compellable by the constable to lodge strangers; they may detain the persons of the guests who eat, or the horse which eats, till payment: (a) they are compellable to keep THE ASSIZE; and to prevent tipling; and the statutes against tipling extend to inn-keepers: an inn is but a great ale-house. (b) They do not deal upon *contracts* as others do; they only make bills, in which they cannot set unreasonable rates; if they do, they are indictable for extortion, which other sellers are not. Though an inn-keeper buy by contract, yet he is no *trader*, if he do not sell by contract: he buys only for particular purposes, and deals but with particular persons. A *sutler* to an army, or a *steward* to an inn of court, cannot be bankrupt, because they buy only for particular purposes: ever since the statute, after so long a tract of time, which was from 13 Eliz. no inn-keeper was ever endeavoured to be brought within the statutes, unless once in *Crisp's case*. (c.) These commissions are not to be encouraged, though designed for good, yet in execution are a grievance: it is the duty of judges to consider *tempera rerum*, and not now to construe inn-keepers bankrupts, when under such hardships by soldiers. And therefore concluded for the plaintiff.

An inn-keeper is not within the statutes of bankrupt.

S. C. Ante, 96.
S. C. 3 Mod.
327.
S. C. 3 Lev. 309.
S. C. Carth.
149.
S. C. Comb. 181.
S. C. Salk. 109.
March. 35.
1 Sid. 461. 491.
8 Mod. 46. 48.
12 Mod. 159.
1 Ld. Ray. 287.
2 Peer Wms.
308.
2 Ld. Ray. 85a.

* [269]

GREGORY *Justice ad idem*. That an inn-keeper is no bankrupt: he that keeps a boarding school, doth, as much as an inn-keeper, buy commodities, and vend them in his house, and receives money for

(a) 2 Brownl. 254. 1 Salk. 388. 2 Bac. Abr. 182.

(b) 1 Bulst. 109.
(c) Cro. Car. 548.

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them, and yet he may refuse whom he pleases; which an inn-keeper cannot do; yet no man will say he is within the statutes. And so he concluded for the plaintiff.

DOLBIN *Justice* was absent.

HOLT *Chief Justice* of the same opinion. An inn-keeper cannot be a bankrupt: he is not taken notice of in our law as a trader for buying and selling, but as *hospitator*, *Caley's case* (d) which describes his life and manner of living: he is bound to provide for travellers, and to protect and secure their goods: he is not paid upon the account of the intrinsic value of his provisions, but for other reasons: the recompence he receives, is for care and pains, and for protection and security. He doth not buy and sell, but only for this particular purpose: by "the trade of buying and selling" in the statute, it must be intended somewhat of the same nature with that mentioned before, *viz.* "exchange and barter." Shoe-makers and tanners, do not sell the commodities, but are paid for their manufacture (e); they only make the commodity useful, and the buying is with intent to make them fit for sale; but the end of an inn-keeper in his buying, is not to sell, but only a part of the accommodation he is bound to prepare for his guests. A farmer is not within the statute, and yet there is not a farmer in * England, but buys and sells, and that necessarily for the managing his occupation as a farmer. (*) Wherever a man sells under a particular restraint and limitation, he is not a seller within the statutes. *Sir Thomas Littleton*, commissioner of the navy, though he bought and sold, yet because confined to the business of THE NAVY, he was held not within the statute. The *case of the gun founders* in the exchequer, was held not to be within it, because a particular undertaking. Suppose an inn-keeper had a farm, and has his provisions out of his farm. Then in *Crisp's case*, they all agree him out of the statute; which is strange, for he still buys man's meat, which is all one: a schoolmaster that takes boarders, he buys great provisions, and gets great credit, and yet he was never thought within the statutes: and, I think, there is as much, or more reason, to bring him within them, for he makes a contract *ad libitum*, which an inn-keeper cannot. And so he concluded for the plaintiff, declaring DOLBIN *Justice* to be of the same opinion. (f)

(d) 8 Co. 32.

(e) Cro. Car. 37. 46. Hutton 44.

(f) In the case of *Meggot v. Mills*, 1 Ld. Ray. 286. HOLT *Chief Justice* is made to say, that "though an inn-keeper cannot be a bankrupt, yet a *viuallier* may." But in the case of *Saunderson v. Rowles*, 4 Burr. 2064. it is determined that "a *viuallier* who sells liquors in his house, and only sells them out of the house in small retail quantities, as every publican does, is not an object of the bankrupt laws: it was admitted, however, that if a *viuallier* deal as a *merchant*, and sell large quantities of liquor out of doors, he would be a *trader* within the statute. See *Harrison's case*, 1 Brown Chan. Cases, 178. And in the

case of *Patman v. Vaughan*, 1 Term Rep. 572. it was determined that an innkeeper who sells liquor out of the house to all customers that apply for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it, may be. In the case of *Priest v. Pidgeon*, 12 Geo. 3. a *viuallier* sold out of his house by retail two gallons of brandy and five dozen of wine; the jury found him a bankrupt; and the court, on the ground that it was a proper subject for the jury to determine, refused a new trial. 1 Bro. C. C. 177. But by LORD TOWNSHEND chancellor, this was a hard case. But see *Bartholemew v. Sherwood*, 1 Term Rep. 573. notis.

(*) See 5 Geo.
2. c. 30. Cook's
B. C. 46.
1 Brown C. C.
373.

* [270]

The King against the Inhabitants of Hornsey.

Case 167.

PRESENTMENT of a justice of peace, upon his view, of a certain way in the parish out of repair: the defendant traverses it generally *non culpabilis*. The jury finds a special verdict, that it was no common highway, but that it was out of repair.

MR. DARNEL for the parish argued, that this being found to be no highway, makes it to be a void presentment, because it is a limited jurisdiction, *Fones* 355. Then supposing it were an indictment, yet this might be given in evidence upon *not guilty*; and cited 10 Hen. 6. 16. in trespass for breaking and entering a warren; "no warren" is an ill plea, because it amounts to the general issue.

HOLT Chief Justice. You may traverse, but that is only by virtue of a particular clause in the statute; but the question is, if when you plead *not guilty*, you do not admit it to be a good presentment, and that it was an highway. A parish who is to repair of common right, cannot plead "*not guilty*," and give in evidence, that another ought to repair, but they must plead it *specialy*; for on *not guilty*, you shall not throw it off on another; as was held by HALES Chief Justice, in the case of *Leather-lane* (a), but if a particular person be indicted for not repairing where he is bound thereto *ratione tenuræ*, there, upon *not guilty*, he may give any thing in evidence; upon an indictment of a parish for an highway, if found not an highway, it is "*not guilty*," as in the case of *Hamstead for Green-lane*; but in case of a presentment, it goes in avoidance of the justices jurisdiction, which this plea doth * admit.

EYRES Justice, it is part of his presentment, that they ought to repair, and then surely they may give it in evidence as a discharge. *Adjournatur*. (b)

(a) See 4 Burr. 2510. YATES and ASTON Justices, are made to say, they are not satisfied with the imperfect report of this case, 1 Vent. 256. 1 Mod. 112. Freeman. 521. and 3 Keb. 301. and could not think that HALES Chief Justice had said what he is there represented to have said.

(b) It is not said in any of the reports of this case, what judgment was given, except S. C. Post. 291. "ordered to stay," but S. C. 4 Mod. 38. S. C. Holt. 338. & C. 12 Mod. 13. agree with this report,

29. Where a justice of the peace presents a highway upon his view to be out of repair, whether the parties are allowed to plead that it is in repair, or may traverse the non-repair.

S. C. Post. 291.
S. C. Fort. 254.
S. C. 4 Mod. 38.
S. C. 10 Mod. 150.
S. C. 12 Mod. 13.
S. C. Holt 338.
S. C. Carth. 212.
S. C. 1 Roll. Rep. 406.

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that the defendant may traverse. And in Rex v. Justices of Wiltshire, Trin. 4 Geo. 3. the Court granted a *mandamus* commanding the justice to receive a *general traverse* to a presentment made by a justice of the peace, upon view, that a highway was out of repair, 3 Burr. 153. See also 1 Hawk. P. C. ch. 76. Rex v. Weston Pen-yard, 4 Burr. 2507. Rex v. Great Broughton, 5 Burr. 2700. Cowp. 648. 3 Term Rep. 265. and the statute 13 Geo. 3. c. 78. § 16.

Case 168.

Hopkins *against* Pace.

A replication to a plea of *ancient demesne*, can not traverse that the *tenement*, but that the *manor*, is *ancient demesne*.

S. C. Comb. 183.

EJECTMENT. *Antient demesne.* Plea, that it is parcel of such a manor, which is *ancient demesne*, &c. Replication, that the tenements in the declaration are pleadable at common law, **ABSQUE HOC**, that those tenements are parcel *de antiquo dominico*. Demurrer to it; and judgment for the defendant.

PER CURIAM. The traverse is ill; you ought to have traversed, that the manor was *ancient demesne*, and that shall be tried by *Doomsday Book*; or else you ought to have traversed, that those tenements were held of that manor.

Case 169.

Burdon *against* Burdon.

In *dower*, the heir cannot plead "dettainer of charters" after imparlance.

S. C. Comb. 183.

S. C. 1 Salk. 252. Moor 81. Rastal 224. Hob. 199. Co. Lit. 39. 1 Term Rep. 278.

ERROR on a judgment in *dower* in *Durham*; where after imparlance, the defendant pleaded "*detinue* of charters," and demurrer, and judgment for the plaintiff thereon, and that judgment now affirmed here **PER CURIAM**.

Case 170.

• Edwards *against* Thompson.

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Evidence on *assumpsit infra sex annos*.

S. C. Holt 284.

3 Term Rep. 68.

ON a trial at *nisi prius* before *HOLT Chief Justice*, it was held by him, on a plea of *non assumpsit infra sex annos ante impetrat' brevis original'*, and replication *assumpsit infra sex annos impetit' brevis pred'*, *viz.* such a day, &c. that in evidence you need not shew the original: so in a *plene administravit*, where the date is mentioned upon record, there you need not shew it in evidence, though it were only by way of *viz.*

The King *against* Hayes.

Case 171.

INDICTMENT for a forceable entry, and disseizing of J. S. of a certain tenement, *ad tunc et adhuc liberum tenementum ipsius J. S.* Exception taken, because not said, in mention of the jurors, to be charged *ad, &c. pro corpore comitatus*, AND HELD, it need not in a particular inquisition.

The words "*ad inquirendum pro corpore comitatus*" are not necessary in a particular inquisition.

1 Sid. 140.

6 Mod. 95. 180. 2 Hawk. P. C. 362.

Then urged to be *repugnant*; for it could not be his freehold after a disseisin, for then the disseisor was seised, and no *precipe* could be brought against the disseisee, *Allen 52. pacifice intravit et vi et armis disseisivit*, held void and repugnant. Held, *PER CURIAM*, ill.

Forceable entry and disseizing A. of a tenement *ad tunc et adhuc liberum tenementum*, is repug-

nant. — Cro. Jac. 214. 639. Cro. Eliz. 754. Palm. 277. 2 Roll. Abr. 80. 4. 64. f. 39.

1 Hawk. P. C.

Phelps *against* Alcock.

Case 172.

DEBT on a bond of submission. The award was to give "a general release, &c."

A release to the time of the submission, is a good performance of an award of release generally.

And held good, though not said "of all actions to the time of the submission;"

3 Keb. 253. Cro. Eliz. 861.

For *PER CURIAM* a release of all, to the time of the submission, is a good performance.

2 Roll. Rep. 2.

3 Lev. 188. 3 Mod. 264. Lutw. 545. 6 Mod. 33. 10 Mod. 201. 12 Mod. 116. 1 Ld. Ray. 115. 2 Ld. Ray. 964. 2 Bl. Rep. 1117. 1 Burr. 277. and see Kyd's Law of Awards, page 162 to 165.

Case 173.

* The King *against* the Mayor of Chichester.

* [273]

A clerical mistake in the return to a *mandamus* may be amended after the term in which the return was made.

1 Salk. 50.

Doug. 114.

134, 135.

1 Term. Rep.

781.

3 Term Rep.

659-749.

MANDAMUS to restore R. FARRINGTON *in locum et officium unius commun' concilii ac un' alderman' civitat' Cicester*.¹

Last term they returned, that FARRINGTON *non fuit electus, et perfectus in locum et officium unius communis concilii ac un' alderman' civitat' Cicestr*.²

This term I moved to amend the return, because they aver several offices, and he might be chosen to the one, and not to the other, and therefore prayed to add "*vel aliquem eor'*"; it being only a mistake of the clerk of the Crown Office, his instructions being general.

And it was accordingly amended.

* Michaelmas Term;

* [274]

The Third of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King against the Mayor of London.

Cafe 174.

MANDAMUS prosecuted against the Mayor and Aldermen of London, by *Sir James Smith*, surmising that, &c. (a)

Judgment in
quo warranto to
seize the liber-
ties of a corpo-
ration does not
dissolve the cor-
poration itself.

TREBY Attorney General. This act for abrogating the old, and requiring new oaths, is an act of the thirteenth of February 1688; for it is declared, that the session began then. *Sir James Smith* was an alderman at that time, and so ought to have taken the oaths. In Easter Term, 9 Jac. in the Common Pleas, on the 21 Hen. 8. c. 13. the statute of pluralities which enacts, "that if any person or per-

S. C. Ante, 263.
S. C. 4 Mod. 52.
S. C. Cardh.
217.

S. C. Skin. 293. 310. S. C. Holt. 168. 310. S. C. 12 Mod. 17. Co. Ent. 527. 2 Mod. 234. Cro. Jas. 260. Palm. 82. Stra. 59. 1 Bl. Rep. 592. 1 Term Rep. 575. 3 Term Rep. 205. 230. 2 Term Rep. 515. See the case of *Rex v. Amery*, 2 Term Rep. 554.

(a) See the statement of the case, ante, page 263.

" sons

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" sons having one benefice with cure of souls, being of the yearly value of eight pounds, or above, accept and take any other such cure of soul, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first benefice shall be adjudged in the law to be void;" the incumbent is deprived; then appeals, then takes another benefice, then the deprivation is reversed; the first is void, because, says HOLT, the sentence was suspended by appeal, and consequently he was in still. In *Lord Cobham's case*, there was an attainder; and the act was, "that the lands should, notwithstanding, descend to his heir;" and though it was objected, that there could be no heir, because of the attainder, yet it was held, that an act of parliament did make an heir; and an act of parliament breaks through all niceties. *Sir James Smith* might be chosen alderman after the judgment, according to the custom and usages of the city, for the act takes notice of such a corporation then in exercise: it takes notice of officers chosen, and that choice must have been according to the custom. The corporation was not altered by the judgment on the *quo warranto*; the prayer of the replication and surrejoinder, were *quod excludantur*; and the judgment was not according to the prayer, but only that they should be seized in to the king's hands. There never was such a judgment before in the world; and the act of parliament calls it "illegal and arbitrary;" * it is contradictory in itself, because it is said to be usurped, and yet says it shall be seized; that which is not, and that which is illegal, shall be seized into the king's hands. The old corporation could never subsist in the king's hands upon a seizure. I agree, that the liberties of the city might be seized into the king's hands, and many ancient judgments there are of that kind; but the sense of these judgments was only a seizing of the governing part, and the putting in of a mayor or *custos*, not thereby destroying, but preserving the corporation, and they still had the same prescription as before. We find pleas in THE HUSTINGS *coram custode et aldermannis*. The writs of restitution are observable; sometimes it is "*libertat' sum*," and sometimes "*majoritat*," which signifies the same thing: besides, there never was any execution of this judgment: the judgment is that it shall be seized, and it never was; there always was a writ to execute it. (b) There are writs and returns of execution, and nothing was understood to be done or altered till the writ of execution; and that was one reason why it was said in the act, that the proceedings were illegal, because that there was actual execution without writ. The design of the whole act throughout, was to ratify all in peace, and to confirm all that had come in, or been placed there upon surrender or removal; and *Sir James Smith* cannot be meant ever to take the oaths at all, but as we say; for to say, that he is to take the oaths the next term after his restitution, is very odd; for the clause that appoints all persons to be restored so to take the oaths, doth not include those that are confirmed.

(b) 6 Edw. 2 Claus' Membr. 2. 3 Inst. 118. Riley's Pleadings in Parliament 168. 277.

PEMBERTON *Serjeant*. I did not expect to hear any argument; but surely the act of parliament recites a judgment of seizure of a corporation into the king's hands as forfeited.

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v.
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HOLT *Chief Justice*. There needs no writ of execution; for in a *quare impedit*, if judgment be against the incumbent, the patron presents without any more ado; and then if the judgment did not seize the corporation into the king's hands, then what need of the act of parliament? and therefore I would hear my brother to that *quare*, if the corporation were gone by this judgment.

Afterwards PEMBERTON *Serjeant*, again. The question is, whether by the judgment in the *quo warranto*, the corporation was dissolved? A corporation is an artificial body, consisting of particular persons, as members constituent thereof, and like unto a natural body to many purposes; that which doth unite them, is the liberties and privileges granted for that purpose. * It is but a *franchise* granted originally to them by king or parliament. In all concessions of liberties and franchises, there is a tacit condition annexed to them, that they use them well; which upon doing otherwise determines them: an abuser forfeits them all. (c) The way for the king to take an advantage of such an abuser, is a *quo warranto*, or information in nature of it, that is the king's writ of right; here these abusers are examined, and then judgment is either given for acquittal, or for the king. There are several sorts of judgments (d) as seizure in *nomine districtionis*, and there they remain for ever, unless they come and replevy them the same term or eyre. (e) If there be a *disclaimer*, then there is a judgment of *ouster* for ever. If he make a title and judgment be for the king, then it is good *quod seiziantur*. (f) In all these cases the party is immediately ousted of the liberty: here it is "*quod capiantur in manus domini regis*," and "*quod capiantur*" in these judgments is the same with, or tantamount to "*capiantur*," as in a judgment "*quod recuperet versus*," we mention it, we say "*recuperavit*;" so "*manus amoveantur*," it is "*amoveantur*." In *Rastall's Entries* (g), it appears by the award, that the leet was presently in the king's hands; for he prays *rehabere, et conceditur*. (h) These other words, "*quod cessant, &c.*" are but *expressio rerum, &c.* and for all the rest, they are all included in the words "*quod capiantur*." The YEAR BOOK, 15 Edw. 4. pl. 12. shews, that by the judgment *quod capiantur*, the franchises are extinct. In *Sir George Reynold's case* (i) held by the very award of the king, he is out of possession immediately, and the party in without any writ: the difference is, where a final judgment upon a forfeiture, and where a distress only. Bro "*Quo warranto*," 6 Edw. 2. makes nothing against us; and the case in *Riley's Plac' Parliam'* 168. was *nomine districtionis*, and not a final judgment; it was a seizure only to give the bishop notice to come in and replevy it, and there ought to have been a proclamation in every county, and

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(c) 20 Edw. 4. pl. 5. pl. 6. 2 Inst. 222.
(d) Riley's Placita Parliamentaria, 168.
Skin. 293. 310. 2 Saund. 46. Lutw. 860.
(e) Burr. 1532. 2 Term Rep. 527. 3 Term
Rep. 205.

(c) 2 Edw. 3 pl. 28, 29.
(f) Yelv. 190.
(g) Raf. Ent. 540. 9 Co. 90.
(h) 9 Co. 99. Co. Ent. 538. 559.
(i)

therefore

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therefore that was reversed. I will agree, that sometimes there are writs of seisin, where the things taken into the king's hands are of profit to him. (k) And the writ is "*ita quod de proficuis respondent*," which shews the reason of it. (l) But here it is otherwise, and therefore I conclude, that the franchise which they claim to be a corporation, was out of them, and, in the king, as extinct; for it is such a franchise as the king cannot have by way of user, and therefore it must be gone, and determined; and if so, * the corporation is dissolved: that which ties them together is their franchise; take away that, and they are so many single persons: for the franchise not only unites them, but distinguishes them, one as a *mayer* and another as an *alderman*, and the like; then that being gone, none of them are such. You have the judgments in the courts here at *Westminster*, that the corporation was dissolved, for there were several trials at bar in each court by juries of *London*, which could not otherwise be. You have the judgment of the parliament in this very act, 2 Will. and Mary, sess. 1. c. 8. for restitution; for in the first paragraph they say, that they were "deprived of their liberties," and what are these liberties but what is mentioned in the first sentence to be a body politic? then it says they "ought to be restored;" then it says, that "for ever hereafter they shall be a corporation." All which proves the corporation gone by the judgment: then it makes a provision for the parties that are to be restored, that they are to take their oaths within convenient time, which shews that they were not to take them by the other law, 1 Will. and Mary, c. 8. for abrogating the oaths of supremacy and allegiance, and appointing other oaths.

MR. SOLICITOR GENERAL SOMERS. That a corporation may not be dissolved or forfeited, was never thought of at the time of the dissolution of the *abbies*; the majority of the judges in the lords house were of this opinion, that it could not be, and in truth it is a question too big to be determined or debated in any court but that one. SIR ROBERT SAWYER never intended it so, and so declared himself; the rest of the judgment "*quod major, &c. capiantur pro fine*" shews it, for they could not be taken for a *fine*, when they were actually disfranchised by operation of law upon the first words. In all those ancient seizures the *custos* and other governors were put in to act in the corporation for the preservation of the corporation. In *Riley* 277. it is "*reddis civitat' pred' civibus pred.*" Not one town corporate in *England*, hath ever lost their prescriptions by any such seizure during all the seizures of the city; the course of the city customs went on as before. (m) The trials at bar mentioned, were not upon that debate as supposed.

HOLT Chief Justice. The Court may award a trial *at the bar*, and a *venire*, but then the parties ought to claim their privilege, and if they do not, a trial at bar may now be, therefore that is not

(k) Co. Ent. §11.

(l) 9 Co. 93.

(m) See Maynard's Edward the Second pl. 16. *inter memoranda saccarii*.

math. The act hath declared the judgment and proceedings "illegal and arbitrary," such a thing as had not a legal form, and therefore void, and orders the record to be vacated. They * might be deprived of their liberties by force. The statute declares all charters of incorporation, since the judgment, to be void; now that could not be, but because the *old corporation* was in force: those who had places at the time of the judgment are confirmed, and nothing can be confirmed that hath not a being. This seems contrary to the writ, because that says, he continually behaved himself well in the office till removed. You cannot take notice of the judgment, any otherwise than as it is recited in the act for restitution, and then it is against them, or in that part of the return, and then it is void, and the rest well enough; here it sufficiently appears, that he occupied the office from the thirteenth of February to the first of August, and that obliged him to take the oaths which he hath not.

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Afterwards the judges delivered their opinions severally.

EYRES Justice. The return is sufficient, and no *peremptory mandamus* ought to go to restore *Sir James Smith*. The difficulty lies upon the act 2 Will. and Mary, sess. 1. c. 8. for restoring the city privileges: if this act had not been made, we could not have taken notice of any judgment against the city or any new incorporation, for then it would have been only a neglect of taking the oaths. There is nothing in the act that makes the return frivolous or inconsistent; the preamble recites the franchises seized into the king's hands as forfeited; the judgment against the city is not to be taken notice of by us any farther than this act recites it. By the judgment, the corporation was not dissolved, and it still subsists, and *Sir James Smith* still continued an alderman, and we must take it as one intire proposition, that he was an alderman before that time chosen. Now the act calls the judgment "illegal and arbitrary," and it is but a judgment of seizing into the king's hands, which is impossible: a corporation is only a capacity, and rests only in intendment of law, and cannot be seized, so as to bring it out of the members into the crown; for what the king cannot have, for that a judgment of seizure cannot be had. *Cro. Jac.* 260. 15 *Edw.* 4. 7. Not a judgment of seizure for a court baron, but only of ouster. I do agree there are several precedents of judgments, where *quo warrantos* are brought against particular persons for claiming to be corporations, but then the judgment is for ouster *quod nullo modo intromittant*: there are judgments of forfeiture of franchises, for they are distinct, and the corporation itself cannot be forfeited, *Palmer's Rep.* 82. In the case of the corporation of *Dublin* all the liberties were seized, but as to the corporation itself there was only a *Casus advisare vult*; there * have been several seizures of franchises, which have been replevied; now that could not be, unless there were a corporation to replevy them. I do agree if the corporation could be seized, it would be dissolved because it cannot subsist in the crown; for then he could not restore it, though he might create a new one. There is, in construction, a priority of the being of the corporation, to that of having franchises: Offices, and the power of

See Mr. Justice Buller's observation on this case, and the opinions of EYRE and DOLBIN Justices, Rex v. Amery, Trinity Term, 28 Geo. 3. 2. Term Rep. 554

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choosing

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choosing others, may be seized into the king's hands, though he cannot exercise them, and he may regrant them, for they subsist to be granted out again; otherwise of a corporation. (n) Now there may be a corporation in *actu signato*, though not in *actu exercito*, because the power of acting as a corporation is stopped. A corporation may subsist, though it hath not the power of choosing officers, and the king may have that, as 10 Co. 33. *Sutton's case*. The enacting clause here says "the said judgment," and that refers to the preamble, which is only for seizure of the liberty and not said of what, and we cannot take notice what "the liberty" was that was so seized; and then, it follows, that Sir James Smith continued an alderman; nor can we take notice that there was a new charter of corporation, for that only makes all such charters void; for the other clauses they confirm none but such as come in upon the surrender; now here the other clause only enlarges the time of taking the oaths to them who were confirmed or restored: no peremptory mandamus.

GREGORY *Justice* of the same opinion. We must take the judgment to be such as it is mentioned in the act; and the judgment there is not such a one as dissolves the corporation. It is not the liberty of being a *body politic* that is said to be seized, but the liberty of them being a *body politic* was seized. The corporation could not be seized; but whether it could or not, I think no peremptory mandamus ought to go.

DOLBIN *Justice dubitans*. I am very doubtful whether the court cannot grant a *peremptory mandamus* or no: we must take this as a true return. If this act had been penned plainly, that by the judgment the liberty of the corporation was seized into the king's hands, then it would be an ill return. I think a corporation may be seized into the king's hands, though it cannot subsist there. It is not plainly expressed, that the liberty of being a *body politic* should be seized into the king's hands; then the franchise of having aldermen had been seized: the act of parliament is the only ground we have to take notice of such a judgment, and it is doubtfully expressed whether the *body politic* be seized into the king's hands. And therefore I am not willing that a peremptory mandamus should go.

Co. Ent. 527.
Cro. Jac. 260.
4 Mod. 58.
1 Salk. 374.
Stra. 952.
4 Burr. 2143.
2277.

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• HOLT *Chief Justice*. The return agrees him duly elected according to the ancient customs of the city, and that he continued so, and that he did not take the oaths. If this act of parliament were not in the case, it would be a good return without all question. The question is, whether the return is not contrary to what is particularly recited in the act of parliament, which is now a public act? There is no office as alderman now, but an adviser in a corporation, and the being of an alderman depends altogether upon the being of the corporation: whether by this judgment, as it is recited, we cannot construe this corporation to be dissolved. I will not give my opinion concerning the effect of the true judgment. I am of

(n) See *Nevil's Case*, Plowden.

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opinion, that a corporation may be forfeited, if the trust be broken, and the end of the institution be perverted. Then, whether a judgment to seize a corporation doth dissolve it? I agree it not so proper a judgment; for the king cannot have it. There are three sorts of *liberties*: a liberty granted from the crown; which doth subsist in the crown: a liberty created *de novo*; and doth exist notwithstanding it be forfeited: and another that cannot exist but in the persons to whom it is granted. In the first, judgment to *seize* or *vass* is proper, for then it belongs to the crown: if the other be forfeited, judgment is for a *seizure*, and no more; for notwithstanding the forfeiture, it exists in the crown: for the latter, judgment is proper to be given only for *ouster*; and that is the proper judgment. I do not think a judgment for *seizure*, where it is a final judgment, is ineffectual: and the judgment for *seizure quousque*, &c. in case of non-appearance, proves it, 15 *Edw.* 4. 2 *Inst.* 270. It is no argument to say, that because the king cannot be the corporation, he cannot seize; for the meaning of seizure is to take it from him that had it. The reason I go upon is this, that there does not appear any judgment actually given, that the franchise of being a corporation should be seized. The liberty of the mayor, commonalty, and citizens of London, is not the liberty of being mayor, commonalty, and citizens: for in the dean and chapter of *Norwich's case*, 3 *Co. Jones* 166. *Fitz. tit. "Corporations,"* 58. 78. adjudged, that the surrender of the *liberty* of the corporation, was no surrender of the *corporation*: no more shall a judgment of seizing the liberties of the corporation, seize the corporation itself. I must agree, that if a corporation, to a particular purpose, be divested of all its powers and liberties, it is gone (e), as in the case of a charity. But now for another corporation, they have power to make bye laws, and govern the place; and though they * have their *liberties* seized, yet they still remain a *corporation*, and might act as such; and that was the reason of the dean and chapter of *Norwich's case*, that they were useful still, as assistant to the bishop. It is not the privilege of the corporation to govern and make bye laws, but it is essential to its being; it is part of the constitution. The aldermen are part of the corporation: the words of the act are, "the liberty of the mayor, commonalty, and citizens, *being* a corporation," that is improper, but we must construe it to be the liberties of the mayor, commonalty, and citizens, *who are* a corporation. The *quo warranto* should have been brought against the burgesses and inhabitants of the place; it is strange that it should be brought against the corporation; we cannot consider this judgment otherwise than as the act doth recite it. No peremptory mandamus.—There is another clause, upon which another writ doth lie, but we are not to advise.

2 Roll. Rep. 92.
Skin. 293. 310.
2 Saund. 46.
1 Lev. 105.
Luc. 86a.
3 Burr. 1532.
2 Term Rep.
527. 552.

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(e) When an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved,

that the crown may grant a new charter. Easter Term, 29 Geo. 3. Rex v. Pafmore, 3 Term Rep. 199. See also 1 Peter Wms. 207.

Case 175.

Gumley against Falkingham.

If a *modus* be paid for a corn mill, and the miller adds two new mill stones, he shall pay extra for the additional profit, but *2g.* If the tythe shall be personal or predial.

S. C. 4 Mod. 45.
S. C. Carth. 215.
F. N. B. 51.
3 Bulst. 212.
1 Roll. Rep. 84.
1 Roll. Abr. 656.
Cro. Jac. 523.
Fitzg. 88.

PROHIBITION: there was one mill for corn, for which a *modus* was paid; and the party adds two new mill-stones. The parson sues for tythes.

SIR THOMAS POWIS argued, That tythes are payable for corn mills, *contra* 2 *Inst.* 621. and he cited 1 *Rolls Abr.* 641, 642, 652. 656. 1 *Rolls Rep.* 405. 3 *Bulst.* 212. *Nat. Brev.* 51. 2 *Inst.* 652. *Litt. Rep.* The tythes of the toll is another profit arising out of the thing, not to the owner, but to the miller; it is a new increase in the hands of another person. Be it predial, personal, or mixed, the court christian hath jurisdiction, 2 *Inst.* 490. Now here the profit is increased; the *modus* shall not extend to the new profit, *Cro. Jac.* 429. Right of estovers shall not go to new rooms or chambers newly erected, 1 *Rolls Abr.* 641. 652. 1 *Brownl.* 31.

MR. WRIGHT *e contra*. It it is but personal: the fulling mills are yielding only of a personal tithe; and the reason is the same for this, that there ought not to be a double tithe, 2 *Inst.* 621. 657. Before the statute of *articuli cleri*, 9 *Edw.* 2. c. 5. no tithes were payable for ancient mills, 12 *Co.* 36.

HOLT *Chief Justice*. The tenth toll-dish is the tithe (a); it is not the owner of the mill, nor the owner of the grain, that hath the profit, but the miller; this is a *predial* tithe, because payable *rectori • loci*, 1. E. where the mill is, not merely where the party lives. It seems reasonable, the parson should have the tenth toll-dish, *adjornatur*. (b)

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(a) See the case of *Chamberlain v. Newte*, 1 *Brown. P. C.* 158.

(b) S. C. 4 Mod. 46. says, the prohibition was granted; but S. C. 215. that the parties were ordered to declare in prohibition, in order that the doubt of the Court, whether the tithes of a titheable mill ought to be *personal* or *predial*. It does not appear whether any thing farther was done. But see *Chamberlain and Plympton v. Newte*, 9 *Viner Abr.* 40. 1 *Eq. Abr.* and 1 *Brown, Parl. Cases*, 157. where upon ap-

peal to the House of Lords, and after reference to the twelve judges, it was determined that a mill for grinding corn by horses shall pay tythe in the nature of *personal* tythes only, that is to say, not the value of the tenth toll-dish, but a tenth part of the clear profits arising from corn ground in the mill, over and above all incident charges. See also the S. P. adjudged in the case of *Donalt v. Lowther*, 2 *Bar. K. B.* 336.

The King *against* Evans.

Case 176.

MANDAMUS to restore him to the office of *clerk of the peace* (a), for the county of *Denbigh*. Returned, that he was made clerk of the peace by A. B. *custos*; that he was removed; that a new *custos* was constituted; that he refused to deliver THE ROLLS to the said *custos*; that articles were exhibited against him in sessions; that he there also refused; that thereon he was removed by order of the justices, according to the statute of 1 Will. and Mary, c. 21.

SIR WILLIAM WILLIAMS moved divers exceptions: that the first refusal the second of May, was pardoned, and for that he could not be removed: that for the last, nay for neither of them, was there any articles, or complaint in writing, according to the tenor of the said act.

PEMBERTON *Serjeant* answered nothing as to the pardon, but urged that the word "articles" did *ex vi termini* import a writing.

BUT THE COURT *e contra*. Nothing is to be intended in a return to a *mandamus*: and HOLT *Chief Justice* declared, that the justices can discharge no clerk of the peace for a fault appearing in court without articles in writing. And afterwards for want of writing, a *peremptory mandamus* was granted.

(a) 4 Comp. Dig. "Mandamus," (A.)

If the session discharge the clerk of the peace under 1 Will. and Mary, c. 21. without a charge being made in writing and exhibited against him, the Court will grant a *mandamus* to restore him.

S. C. Holt. 188.
S. C. 4 Mod. 31.
S. C. 12 Mod. 13.
Post 427. &c.
Mod. Caf. 192.
Stra. 996.
Stiles 452.
Vent. 143. 153.
5 Mod. 386.
Carth. 426.
Ld. Ray. 158.
166.
2 Salk. 467.

Haynes *against* Rogers.

Case 177.

CASE, for that the defendant *tali die et loco falso et malitiose ei crimen feloniam imposuit*.

Moved, that it was too general and uncertain.

And PER CURIAM, no other act held necessary to be alledged; but yet words importing a charge of felony, will not be proof of it; there must be proof of some act. Judgment for the plaintiff.

A declaration that the defendant *crimen feloniam imposuit*, is sufficiently certain; but to prove it some act must be shewn.

1 Roll. Abr. 114.

Yelv. 46. Cro. Jac. 191. 490. 1 Leon. 108.

Case 178.

* The King against Parsons.

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A pardon of murder by the words "*murdrum et feloniam interfectionem*" is good, although the reasons of the king's mercy is not expressed, and only the indictment and attainer recited therein; but the pardon must be allowed before it can be pleaded, for it is always on condition of the offender finding sureties.

S. C. Holt. 519.
S. C. 2 Salk. 499.
Bracton, 133.
Staunford, P. C. 99.

1 Sid. 366.
3 Inst. 233.
March 217.
Moor 752.
Kely. 24.
Ray. 13.
3 Mod. 37.
4 Mod. 31.
4 Mod. 61.
1 Lev. 8.
12 Mod. 13.
5 Mod. 386.
2 Hawk. P. C. ch. 37. f. 14.
Ld. Ray. 153.
2 Stra. 997.
3 Bac. Abr. 743. 806.

THE defendant was outlawed for the murder of one *Wade* in *Essex*, for which he had fled and continued in *Holland* till THE REVOLUTION; and then appearing publicly at *White-hall*, he was, at last, by some of that county complained of to the Chief Justice, and by him committed to THE MARSHAL. He reverber his outlawry, and was tried and convicted of murder, and condemned. Then he pleads a pardon, reciting the indictment and attainer. The king pardons it by the words "*murdrum et feloniam interfectionem*," for the which he had procured a writ of allowance, and that per HOLT is necessary, for the pardon of murder is conditional, viz. the finding sureties, and there must be a writ of allowance, signifying the performance of that condition, and it is not merely at the peril of the party; for we ought not to give a final judgment upon ignorance of its performance. (a) Now no non obstante are used, which always formerly were held sufficient for the statute that requires it. (b)

SIR FRANCIS WINNINGTON, however, opposed the allowance of the pardon; for that in this pardon the king seems to be informed of nothing but the just proceedings of this court in the attainer, and then comes immediately "*sciatis nos, &c.*" Here is no reason for mercy so much as furnished. Coke saith (c), that he never saw any pardon of murder by express name. When *Abel* was slain by *Cain*, it is said, according to some readings, that his offence was too great to be forgiven: and *Selden* saith, the command that "by whom man's blood is shed, by man shall his blood be shed," extends not only to the Jews, but to all the world. (d) Since christianity was planted in England, murder was always a crime beyond mercy. In THE REGISTER, where are the writs for allowance of pardons, there are forms for such cases where there is no *malitia præcogitata*, but there is no such writ of allowance for murder: KING ALFRED's letter is to the same purpose. The ancient *Book of Oaths* hath the king's coronation oath in it, which is to shew mercy where mercy, &c. but here is nothing alledged in the patent to found mercy; no certificate of the justices; no report of

(a) By 10 Edw. 3. c. 3. Pardons are declared void, unless the party find six mainperners before the sheriff and coroner of the county where the felony was committed; and therefore a writ of allowance was he'd necessary on pleading a pardon, in order to testify that the offender had found the sureties required by the statute. Co. P. C. 234. 4 Mod. 62. Salk. 459. but this statute is repealed by 5 and 6 Will. and Mary, c. 13. which enacts, that the justices before whom a pardon of felony is pleaded may, at their discretion, remand the party to prison until he find two sureties for his good behaviour for seven years;

and there has not been any instance, since this statute, of the courts requiring such a recognizance of a person pardoned for murder. Strange, 1203.

(b) By 1 Will. and Mary, sess. 2. c. 2. an act for declaring the rights and liberties of the subject, it is enacted, "that no dispensation by non obstante of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute."

(c) 3 Inst. 235.

(d) Vide Barlow's case of pardoning murder, 2 contra.

hardship;

hardship; nothing but only a recital of a wilful malicious murder, and a just, legal attainder thereof: in *Rickabie's case* (e) it is questioned whether the word "homicide" could pardon murder; but murder is not inferted, nor ever was. The statute * of Gloucester, 3 *Edw.* 1. c. 24. *Fleta*, lib. 1. "homicide;" the 4 *Edw.* 3. c. 1. the 10 *Edw.* 3. c. 23. *Cotton's Records*, 17, 18. 14 *Edw.* 3. pl. 15; the 27 *Edw.* 3. c. 2. the 13 *Rich.* 2. c. 1. *Styles* 325. *Stamford* 101. all take it, that there must be a *non obstante* for it: now by the *Bill of Rights* (f), no dispensation is to be allowed to any statute; and by 2 *Hen.* 7. c. 6. without a clause of *non obstante* it is void. (g) There must be a *non obstante* to get off these statutes; it was never pretended to be good without one. (h) Here is neither *suggestion*, nor *report*, nor *non obstante*, and the king could not pardon murder at common law; for he is but a trustee; and all the people have an interest in the justice of the realm.

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HOLT Chief Justice. The power of pardoning all offences is an inseparable incident to the crown and its royal power. It is as much for the good of the people, that the king should pardon, as that he should punish. If the statute of 2 *Edw.* 3. c. 2. take away the power of pardoning murders, it takes away his power even in trespasses: he is the best judge of his own mercy: the statute of 13 *Rich.* 2. c. 1. is, that he shall not pardon by general words; but here is a recital of the fact. The 16 *Rich.* 2. c. 6. is a repeal of part of the 13 *Rich.* 2. c. 1. as a grievance to the people. And for your doctrine about *Cain*, he was pardoned for his life.

Hales Summary,
250.
Cro. Car. 596.
Cro. Eliz. 814.
Co. Lit. 114.
3 Bac. Abr. 802.
2 Hawk. P. C.
c. 37.

DOLBIN Justice. The king at common law had power to pardon all offences; and if murder be named, there needs no *non obstante*.

EYRES Justice. *Homicid. et felonice interfection.* with a *non obstante*, was always held good; and now with the fact recited, and the word "*murdrum*" is good without it.

And so the pardon was allowed PER CURIAM.

(e) March 213. *Stiles*, 369. 375.

(f) Statute 1 William and Mary, c. 8.

(g) *Raft. Ent.* 455. *Staundf. P. C.* 101.

(h) *Dudley's case*, 1 *Sid.* 366.

Case 179.

Glover against Cope.

Easter Term, 3 William and Mary, Roll 267.

If a copyholder make a lease, in which the lessee covenants to repair, and the copyholder afterwards surrenders the reversion to the use of A. the assignee of the reversion, after admittance, may by 32 Hen. 8. c. 34. maintain covenant against the lessee for not repairing, although he had assigned the term.

S. C. 3 Lev. 326.
S. C. 4 Mod. 80.

S. C. Carth 205.

S. C. Holt, 159.

S. C. Salk. 185.

S. C. Skin. 226.

305.

S. C. Comb. 315.

Yelv. 222.

Cro. Jac. 305.

Cro. Car. 24.

Dough. 188.

2 Leon. 33.

3 Term Rep. 398.

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COVENANT: The case was, a copyholder in fee makes a lease for years, with covenants for repairs; the copyholder surrenders to the use of the plaintiff; the plaintiff is admitted; and then brings an action of covenant against the lessee: The lessee pleads an assignment of his term to J. S: The plaintiff demurs.

* **MR. NORTHEY** for the plaintiff. If this were a freehold, it would be admitted to me, that the action lies at common law, according to the case of *Brett v. Cumberland* (a); and there is no difference between this case and the case of *Swinerton v. Miller*. (b) A copyhold rent is incident to the reversion, and passes by a surrender of it. (c) When a copyholder in fee surrenders, the lord is but an instrument, and the estate of the surrenderor remains in himself, and the *surrenderee* is an *assignee* of the estate which he had: it is true, if a copyholder *for life* surrender, that is drowned, and the new estate comes out of the estate of the lord, but if *in fee* it is otherwise. By the common law, an assignee of the reversion might bring covenant, because it runs with the land. (d) Here the action is brought against the lessee after assignment; and therefore though he be not chargeable, either upon the estate, or contract, yet he is upon his express undertaking. (e) Then he is within 32 Hen. 8. c. 34. A copyhold is within the mischief of the act, as well as the other case of a freehold; this is a remedial law; and there is the same reason why copyholders should be within the statute, as within the statute of champerty. (f) This construction alters not the service, or term, or customs of the manor. (g) And there is no authority against it: the case of *Platt v. Plummer* (b), is a *quære*, but no judgment in the case; and though in *Cro. Car.* 44. it be said to be not within the statute, yet there is no authority for it: then for the case of *Beale v. Brasier*, (i) that a copyholder cannot enter for a condition within that statute, it was a case without argument or debate; and though it may not extend to conditions and entries for the breach of them, because of changing the possession to the prejudice of the lord, yet it may extend to covenants.

MR. COOPER *à contra*. The action does not lie at common law, for it is brought by a surrenderee of copyhold land against a lessee after assignment. The freehold is still the lord's, and the lands

(a) Cro. Jac. 399. 521. Pasch. 136.
3 Bulst. 163. Godb. 276. 1 Roll. Rep. 359. 2 Roll. Rep. 63.

(b) Hob. 177.

(c) Cro. Eliz. 361. 4 Co. 21. 27.

(d) 5 Co. 1 Roll. Rep. 360 Fitz. Abr. "Covenant," pl. 7. and pl. 13. Bro. Abr. "Covenant," pl. 32. pl. 39. Cro.

Car. 221. Owen, 152. 2 Bulst. 281.
1 Saund. 240.

(e) Bro. Abr. title "Covenant," pl. 32.

(f) 4 Co. 21. 3 Co. 8. 9.

(g) Co. Lit. 33.

(h) Cro. Car. 24.

(i) Cro. Jac. 305. Yelv. 222.

continue still the demesne of the lord: for if a copyholder in fee take a lease, though but for three years, yet the copyhold is drowned. (k) Then * for the statute: in *Plowd.* 174, it admitted a debate, whether any but the grantees of reversions from the crown were within it? So far were they from thinking the statute did include copyholds. This is no reversion; for the party comes in from the lord; and like the case of *Chaworth v. Phillips*. (l) Lessee for twenty years, makes a lease for ten years, upon condition: then the lessee for twenty years, surrenders to him in reversion; he in the reversion shall not take benefit of the condition, because he is in of an estate paramount. Then it appears by the same case, that this statute is not further extended than the purview; for if condition be to be void if ten pounds be not paid at a certain day, the grantee of the reversion cannot enter for the condition broken, because it is collateral. (m) Nor is there any answer given to the cases of entry for condition, for a covenant is more collateral than a condition; for a condition is annexed to the estate, but covenants are foreign; and therefore if it doth not extend to conditions, much less will it to covenants.

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*
Coke.

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HOLT *Chief Justice*. As to the common law, I doubt it lies not; but as to the statute, it seems within it; however, let us hear another argument, *vide Rolls Rep.* 360.

Afterwards LEVINS *Serjeant* for the plaintiff. This covenant is maintainable at common law, 42 *Edw.* 3. pl. 3. 9 *Hen.* 6. pl. 6. 5 *Hen.* 7. 19. and *Mich.* 25 *Car.* 2. in the Exchequer, *Lower v. Williams*. A. seised in fee makes a long lease for years, and covenants with the lessor and his executors to repair; yet held, the heir might bring covenant, upon the reason of *Sacheverell v. Frogate* (n), because it was plainly intended, that the term was to last longer than his life, and consequently the covenant shall go with the land on both sides. (o) The covenant shall bind and follow the land. *Baylie v. Hughes*. (p) The assignee of a term shall have benefit of a covenant, to deduct rent upon disturbance in perception of the profits, because it goes with the land: but you say, if it go with the land, the assignee is chargeable, and not the lessee: for that I answer, that if the covenant goes with the reversion, then let the assignee do what he will, the lessee is bound by his own covenant notwithstanding his assignment; and so are the cases of *Batchellor* (q), and of *Norton v. Ackland*. (r) But then they say, these actions are brought by the lessor himself upon the account of privity of contract: now, I say, that if it be incident to the reversion, the lessee is still bound, according to *Brett v. Cumberland*. (s) If not at common law, yet we are within the statute of 32 *Hen.* 8. c. 34. *Beale v. Brasier*. (t) * * [287]

(k) 3 Co. 8.

(l) Moor, pl. 876.

(m) 4 Co. 29.

(n) 1 Vent. 161. 2 Saund. 361. Raym. 413. 2 Lev. 13. 2 Keb. 798.

(o) 5 Co. 35.

(p) Cro. Car. 137.

(q) Cro. Car. 188. 1 Jones 223.

(r) Cro. Car. 580.

(s) Cro. Jac. 2.

(t) Cro. Jac. 399. 521.

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It is adjudged against me, but that was without the due consideration it deserves; the same in *Rowden v. Malster* (u), was only said by some *arguendo*, but that case hath not stood; and contrary thereto, it hath been held, that a copyhold may be intailed, and so held in the case of *Sir William Wentworth*. (x) In the case of *Platt v. Plummer* (y), it was found on a special verdict, and no judgment in it: the tenant-right estates in the north, which are not freeholds, will be within the same consideration as copyholds. It has been a question; whether the grantee of a reversion upon a lease for years, were within the statute, but that hath been settled to be so. (z) Copyholds were not of that small regard at the time of making this statute of 32 Hen. 8. c. 34. for before that, a copyholder shall have aid of his lord (a); so that they were of value then, and are so still, since the statute. (b) The laws which are for general repose and relief, shall extend to them. (c) They are within the statute of limitation. (d) This statute of 32 Hen. 8. c. 34. speaks of all grantees of reversions, which is general, and includes all: whereas these statutes that have been construed not to extend to copyhold lands, make mention only of lands, tenements, and hereditaments, which rather should be restrained to common law lands. They are held within the statute of pretended rights, &c. (e); and that was an act made at the same session of parliament with this. (f) They are within the statute of fines (g), and within the statute of 13 Eliz. c. 10. for restraint of ecclesiastical persons. (h)

See Dougl. 716.
note (1.)

MR. ROW *à contra*. At common law there can be no great doubt, but that this action doth not lie; and it is not within the statute; for notwithstanding all the favourable opinions which have been given for copyholds, it is but an estate at will, and can pass only by surrender to the lord, and he to regrant it; and the surrenderee is in in the post. (i) This term is forfeitable to the lord of the manor; the copyholder, though he hath a fee, yet he is in nature of a particular tenant. (k) Upon the statute of 32 Hen. 8. c. 34. only those statutes which concern or affect the state of the land, have been construed not to extend to copyholds; as the statute which gave an *elegit*; the statute of *Alton Burnell* did not. (l) It is true, statutes which regard criminal matters, have been adjudged to reach it; he cited, 1 *Leon*. 97. *Owen* 37. The case of *Beale v. Brafter*, *Cro. Jac.* 305. is express; * and that of *Platt v. Plummer*, *Cro. Car.* 24, 25, though there is no judgment in it, yet it shews the plaintiff could not speed in it, and consequently the opinion of the Court was against him.

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(u) *Cro. Car.* 44.

(x) *Finch*, C. R. 263.

(y) *Cro. Car.* 24. Co. Copy. 87.

(z) *Lit. f.* 77. *Kelway*, 77.

(a) 12 *Edw.* 4. pl. 7.

(b) *Owen*, 73. Co. Lit. 59. 4 Co. 28,

23.

(c) *Moor*, pl. 276.

(d) *Hayden's case*, 3 Co. 9.

(e) 4 Co. 26.

(f) 32 Hen. 8. c. 9; and see 1 *Hawk.*
P. C. ch. 86. f. 12.

(g) *Mary Podger's case*, 6 Co. 37.

(h) The case of the Dean and Chapter of
Worcester, 6 Co. 35.

(i) 22 *Affize*, pl. 27. and pl. 37. *Cro.*
Eliz. 606. 622. 666. 1 *Roll. Abr.* 509.

51.
(k) See *Moor*, 637. and 3 Co. 9.
Spencer's case 5 Co. 16. reported there by
the name of *Spencer v. Clarke*. S. C. 2
Roll. Abr. 743.

(l) 1 *Sid.* 11.

HOLT Chief Justice. This is within the statute as much as any thing can be within the equity of a statute.

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DOLBIN Justice. The true reason why at any time copyholds are adjudged out of such statutes, is for the damage to the lord, and there can be none here; now an estate tail may be of it, and, by custom, docked by a surrender.

And so without solemn argument at bench, judgment was given for the plaintiff.

The King *against* the Mayor and City of Bristol.

Case 180.

MANDAMUS generally to restore *Rowe* to the office of SWORD BEARER to the mayor of *Bristol*, and *weigher*, &c.

A *mandamus* lies to restore a person to the office of *sword bearer*, removed for absence and non-attendance.

Return of removal for absence and non-attendance on the mayor *in diversis progressibus suis per tale tempus*, &c. and an outlawry of him such a term, &c.

PER CURIAM. The absence is no forfeiture of his place, because not said to be in his progresses as mayor; and absence in his person is no forfeiture.

Dougl. 177.
1 Term Rep.
423.
2 Term Rep.
177. 259.

But however he cannot be restored, because of *the outlawry*; for that is a disability, and he must sue out a new writ reciting the outlawry and its reversal, for we cannot otherwise take notice of the reversal since; though it did not forfeit his office, yet it is a disability: a parker outlawed could not bring a writ of affize.

A person outlawed cannot be restored to an office by *mandamus*, without shewing the *outlawry* reversed.

And afterwards he brought such a special writ, and we amended the return, &c.

Case 181.

Jones against Bean.

The office of chancellor of a bishop may, by usage, be granted to two persons *conjunctim et divisim* and the longest liver of them: so also of the office of *prothonotary* and *custos brevium*.

S. C. 4 Mod.

16. 19. 27.

S. C. 2 Salk.

465.

S. C. Carth.

213.

S. C. 12 Mod.

10.

2 Roll. Abr.

152.

Cro. Elis. 625.

11 Co. 3.

3 Lev. 399.

2 Jones 127.

4 Mod. 17.

2 Mod. 23.

8 Mod. 303.

Dyer 149.

4 Com. Dig.

285.

4 Barr. 2242.

Comp. 195.

3 Bac. Abr.

724. 738.

* [289]

THE CASE upon a special verdict was, that before the statute of 1 Eliz. c. 19. the bishop of *Landaff* in *Wales*, used to grant the office of the official or chancellorship to two persons, and the longer liver of them: that the late bishop made such a grant to J. S. and the plaintiff *conjunctim et divisim*, and to the longer liver of them: that it was confirmed by the dean and chapter: that J. S. died; that the present bishop made a new grant to the defendant, and he received twenty pounds of the fees, &c.

THOMPSON. This grant is void at common law, for it is a *judicial office*, and cannot be granted to two: and * so is *Auditor Curle's case*, 11 Co. 2. (a) For how can two persons be one officer? Suppose one doth absolve, and another doth excommunicate. If it were a good grant before the statute, then I must agree it not restrained: but in the case of *Walker v. Lamb*, Cro. Car. 258. (b) such office is not grantable in reversion.

PER CURIAM here in this court were two prothonotaries, HENLEY and WHITAKER: it is true, the Common Pleas custom will not warrant two persons to make one chief prothonotary, the usage doth it: here are two persons make one *custos brevium*, GOODWIN and FOULKES; there was an usage for this in several places, and then good within 1 Eliz. c. 19. (c) As to the sheriffs of *London*, when one dies, the other cannot act; he is no sheriff; he must wait till another be made; usage makes that. The inconvenience here is not so great, and the usage having been so, I know not why it should be otherwise than good: the only reason why there cannot be two chief prothonotaries is, because of the usage. The ordinary may come and judge when he pleases, and therefore difference in opinion here is no inconvenience: the chancellorship of the archdeaconry of *Rippon* is so as this; and so is that of *Lincoln*.

Judgment for the plaintiff.

(a) S. C. 2 Roll. Abr. 86. See also 2 Roll. Abr. 152. pl. 47. 4 Inst. 146. Com. Dig. "Offices" (B. 1.) 3 Mod. 149. (b) S. C. 1 Jones 263. Com. Dig.

"Estates" (G. 5.) 2 Lev. 245.

(c) 11 Co. 3. Dyer 149. Salk. 465. Hardres 357.

Beake against Kent.

Case 182.

Trinity Term, 3 William & Mary, Roll 377.

INDEBITATUS ASSUMPSIT for wares sold, against defendant as executor of, &c. The defendant pleads three judgments, and no assets *ultra*. The plaintiff replies, that there is so much due on each judgment, and no more, and that he has assets *ultra* these sums, *et sic continuat per fraudem*. The defendant rejoins, that they are all for just debts, **ABSQUE HOC** that he permits them, or any of them, to be kept on foot by fraud. The plaintiff demurs, because the *traverse* is to all, or any; whereas it should have been several to each judgment.

TREMAIN. This is an ill rejoinder; and so was the case of *Wakehouse v. Symonds*. (a) Where five judgments pleaded; and a replication that such a one was paid so much of his debt, and so several replications to each; and that they were severally continued by fraud; rejoinder, that the judgments aforesaid are unsatisfied, and does not say severally, that they were not kept on foot by fraud: he cited the case of *Croyden v. Atwell*, (b) where he "severally" answered; and the case of *Sams v. Mercer*, (c) where several judgments were pleaded, and concludes *prout patet per recorda pred.* and held ill, for he ought to have concluded so to each.

MR. DEE à contra. If this pleading be faulty, the replication commits the first fault; for they might have replied * *fraud* to any one in particular, and that would have done their business, as in *Hancock v. Proud*. (d) This is well enough, (e) and our rejoinder is well enough, (f) for we traverse **ABSQUE HOC**, that he kept them *vel aliqu. eorum*, &c.

HOLT Chief Justice. The plaintiff has the liberty of replying to them all severally, as in *Tresham's case*. (g) But you need not aver fraud to every one; if to any, it is enough to avoid their bar: or you might generally have said *judic. separalia pred.* were kept on foot by fraud. The cause of the exception in the case of *Wakehouse v. Symond* was, because he did not say *nec eorum aliquis*, and I thought that hard enough; for in a *general issue*, you must say *nec eorum aliquis*, but in a *special bar* you need not; for if false in part, it is so in the whole. In the case of waste, for cutting twenty oaks, (b) you must plead that you did not cut them, *or any of them*, but in debt on bond, if breach be that he did cut twenty oaks, it is enough to say he did not cut them *modo et forma*. (i) *Adjournatur*. (k)

(a) See 4 Mod. 63.

(b) 1 Roll Abr. 802.

(c) Cro. Jac. 626.

(d) 2 Saund. 336. S. C. 1 Sid. 429.

2 Keb. 535. 542. 562.

(e) 1 Sid. 29.

(f) Year Book, 15 Hen. 7. pl. 10.

Dyer 181.

VOL. I.

(g) 9 Co. 108.

(h) Dyer 115.

(i) Robert v. Andrews, Cro. Eliz. 83.

(k) THE COURT held the rejoinder good; and the plaintiff discontinued. S. C. Carth. 196. S. C. Holt, 546.

In an action against an executrix, if the defendant plead several judgments, the plaintiff may reply to each severally, or to all generally, or to one only, or to part, that they were continued by fraud; and the defendant may rejoin that they are all for just debts, and traverse the fraud jointly and severally.

S. C. Carth.

195.

S. C. 4 Mod. 63.

S. C. Holt, 545.

9 Co. 110.

Skin. 299.

1 Saik. 298.

8 Mod. 282.

10 Mod. 324.

12 Mod. 153.

Stra. 732.

Ld. Ray. 263.

2 Vern. 37.

* [290.]

Case 183.

Lewis *against* Preston.

A plea to a bond to pay while letters patent are in force must shew how they became void.

2 C. Skin. 303.
1 Sid. 334.

2 Co. 4.

Cro. Jac. 363.

DEBT on a bond, conditioned to pay so much money yearly, while such letters patents are in force. Plea, that from such a time till such a time, he did pay, and that then the letters patents became void, and of no force. The plaintiff replies, that they were in force; *et hoc petit quod inquiretur per patriam*. The defendant demurs. And PER CURIAM the plea is ill, because it does not shew how the letters patents became void.

2 Lev. 125. 1 Lev. 191. 5 Com. Dig. "Pleader" (E. 25.) (2. V. 12.)

Case 184.

Hannam *against* Stephens.

The conusee of a statute though after *liberate* returned cannot assign the lands before recovery in ejectment, or other action, and actual entry.

S. C. 3 Lev. 312.

S. C. 4 Mod. 48.

S. C. Skin. 300.

S. C. Salk. 563.

Co. Lit. 314.

3 Co. 4. 11.

Cro. Car. 310.

1 Bac. Abr. 157, 158.

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EJECTMENT on a special verdict. A statute was extended, and a *liberate* returned, but no possession, and the conusor still enjoys the land.

The question was, if this is assignable.

IT WAS ARGUED for the plaintiff, that there is no turning any estate to a right, to an interest whereon an ejectment may be brought, and the possessor removed: the conusor is not a disseisor but at my election. (a) I have still all the possession as I ever had, and that is what the law gives me upon the *liberate*: upon the return of the *liberate*, the conusee is then said to become tenant by STATUTE STAPLE, and then there is * an interest in him by agreement of the party upon the *concessit*: it is at least in nature of an *interesse termini*, it is not a mere right, but like *Bracebridge's case*. (b) In *Coke Littleton* (c) a lessee for years before entry, is said to be the same with tenant by *statute staple*, and therefore the one is assignable as well as the other.

HOLT Chief Justice. The books say, when the *liberate* is awarded, the party may enter, and then, from the execution of the writ, the party is in possession; and then when the party goes away, this is an actual ouster, and this turns it to a right: and I have known this before ELLIS Justice in the circuit, and held not assignable for want of an actual entry and possession.

DOLBIN Justice. Upon a lease for years, it has oftentimes been doubted.

EYRES Justice. I was of that opinion always, and have advised administrations to be sued out to the conusee upon that account, and I believe in this very case.

(a) Pawley v. Blackman, Cro. Jac. 659. Taylor v. Horde. 1 Burr. 60. Atkins v. Horde, Cowp. 689.

(b) Plowden, 423.
(c) Co. Lit. 270.

Herne *against* Jennings.

Case 185.

ACTION on the case for slander, *viz.* these words, "He is in "Newgate for an highway-man." Verdict for the plaintiff on not guilty pleaded.

To say, "He is
"in Newgate
"for a high-
"way-man," is
not actionable.

MR. DARNELL moved in arrest of judgment, that the words are not actionable, and cited *Hob.* 177. *Cro. Jac.* 687.

MR. NORTHEY *e contra* cited *Cro. Jac.* 154. 247. 536. *Cro. Car.* 268. and *Jones* 299.

And ordered BY THE COURT to stay *quousque*, &c.

The King *against* the Inhabitants of Hornsey.

Case 186.

THE case was now moved again. Holt *Chief Justice*. The being of an highway is matter of supposal, and must be denied in pleading (a), and so held in the case of *Leather-lane*. (b)

Presentment for
a highway being
out of repair.

EYRES *Justice*. You may give it in evidence, for it is the same with "no park," or "no warren." In trespass it is "not guilty." The presentment is but in nature of an indictment.

S. C. Ante,
270.
S. C. Fort. 254.
S. C. 4 Mod. 38.
S. C. 10 Mod.
150.
S. C. 12 Mod.
13.
S. C. Holt. 378.
S. C. Carth. 212.

PER CURIAM ordered to stay.

(a) See *Aspindall v. Brown*, 3 Term Rep. 265. (b) 1 Mod. 112.

* The King *against*

Case 187.

* [292]

INDICTMENT for forestalling, by buying at *Billingsgate* of fish.

Billingsgate a
free market.

And held by HOLT *Chief Justice* on trial at *nisi prius*, that the party was not guilty; for *Billingsgate* was a market time out of mind, and so the party was acquitted: and by him, were it otherwise, all the fish-mongers were liable to prosecutions.

NOTE, this was at the instance of that company against a poor woman that cried fish. (a)

(a) See the statutes, 10 and 11 Will. 3. c. 24. and 9 Ann. c. 26.

Trinity

* Trinity Term,

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The Third of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt. } *Justices.*

Sir GILES EYRES, Knt.

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Hill *against* Mills and another.

Case 188.

HENRY HILLS, citizen and stationer of London, made his will, and constituted *Elizabeth* his wife, and *Adiel Mills* executors; and gave the residue of his own THIRD PART equally to be divided between *Gillam*, his son by his first wife; *James* and *George Hills*, his sons by his second wife (his two other children having been advanced by him in his lifetime) with a clause, that if either of his sons should contest or sue for any thing contrary to, or to invalidate his will, such his legacy should be void. Probate of the will

The ordinary cannot refuse to grant probate of a will to the executor appointed by the testator; and if a suit be instituted to revoke a probate so granted, on

account of the executor being incapable by the canon law, the common law courts will grant a prohibition. — S. C. 1 Salk. 36. S. C. Comb. 185. S. C. Skin. 299. S. C. 12 Mod. 9. S. C. Holt, 904. Cro. Car. 294. 5 Co. 30. 1 Salk. 299. Stra. 257. 3 Burr. 1392. 1 Bac. Abr. 612. 2 Bac. Abr. 377.

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was granted to *Adiel Mills*, one of the executors, and denied to *the widow*, she being a *popish convict*, (a) the conviction being exhibited into court, and there remains with the registry. *Gilliam Hills*, one of the children, and residuary legatee, cites *Adiel Mills* to shew cause why the probate granted to him, should not be revoked, and administration granted to him the said *Gilliam*, with the will annexed. In the citation, no cause was expressed; but upon *Mr. Mill's* appearance, the judge of the prerogative examines him, if any commission was sued out against him. He owns it, and that it was not supereded; and then he urges, that his creditors had given him one thousand pounds. The judge likewise examines some witnesses about a mortgage of part of the estate of *Hills*, which was thus: *Hill* in his life-time, had made a mortgage to *Mills* for a thousand pounds, which *Mills* assigned after *Hill's* death, &c.

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SIR THOMAS PINFOLD then argued to this effect: That * *Mr. Mills* is but a *nude executor*, and he hath no interest in the testator's estate; and now, by becoming a *bankrupt*, he is unfit and disabled to manage another's estate, who wants honesty or conduct in his own; that the ordinary is judge of all this matter; that a probate may be revoked, and the judge hath power to revoke; that if the testator say that he will not have his executors to give an account, yet the judge, upon consideration of the circumstances, &c. may call him to an account, for the judge may order that which the testator would have done upon knowledge of those circumstances, LINWOOD *de testament. religion. verbo rationem*; that in the same book *nisi talibus*, that an ordinary may remove an executor deputed by the testator when he sees just cause for doing it, where there is a sufficient presumption of fraud; though poverty if accompanied with diligence, be not so; and in THE INSTITUTES *de suspectis tutoribus*, if *suspectus de moribus*, he may be removed.

Linwood 168,
177.

MR. WARD, of the same side. That he was but a trustee; he had no interest: and in chancery upon any misdemeanor, they do often transfer the trust, there the ordinary is the judge.

I ARGUED *à contra* that this probate was not revokable by our law. (b) The ordinary here is compellable to give probate to an executor; that the revoking it is an altering of the will of the testator, and making a new one for him; that the intention of the party, the *mens testandi*, is as strong for the constituting of him executor, as for the giving the sons their legacies; that it was plainly the express will of the testator, that his sons should not have the conduct of his estate: he gives it to them *sub alio modo*, viz. under the managery of such a one his executor. Then as to the bankruptcy,

(a) By 3 Jac. 1. c. 5. s. 11. "Every
" popish recusant convicted of popish re-
" cufancy shall stand and be reputed to
" all intents and purposes disabled as a
" person lawfully and duly excommuni-
" cated." And an excommunicated per-
" son cannot be an executor or administrator,

Co. Lit. 134. Swinb. 349. Godolp. 85.
But see 2 Bulst. 155. 4 Mod. 357.
1 Hawk. P. C. 33. and Wentworth's Of-
fice of Ex. 17.

(b) See *Allan v. Dundas*, 3 Term Rep.
125.

that

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that is no disability or breach of trust *quoad* his executorship, for what he has *as executor* the law protects from all forfeiture, for an outlawry affects it not: nay, if he be resolved into a state of damnation by excommunication, that is no disability upon him in that respect; (c) an attainder of treason or felony will not any ways forfeit it; the law calls it not his, because in another's right; if he grant *omnia bona sua*, the goods which he has as executor will not pass; if he release all debts due to him, it will not bar a suit as executor; the commissioners of bankruptcy cannot assign any thing but his own estate, so there is no danger to the testator concerned by this bankruptcy: Then as to his fitness to be trusted, the testator knew him, and judged him fit, and made him executor; he is completely and entirely so, without any act of the court christian; the probate is only to capacitate him to sue; he may pay debts, and release debts before and without * probate; he may do any act of administration even without exception. Now no man or court can determine executorship without his own renunciation; he must still sue, I say he must; this administrator can never bring an action; but if he do, the defendant may plead an executor made and living; he is undoubtedly still liable for all debts: administrator is an executor appointed by the judge, and therefore no argument from thence can affect this case: it is true, an administration to *Forth* was revoked, because of his bankruptcy; but here is an executor made by the party, which the law entitles to have a probate of his testator's will; surely there never was a citation for this purpose, or any revocation of a probate granted to an executor, ever since the original of ecclesiastical, or any courts in *England*, &c.

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SIR RICHARD RAINES, *the Judge*, made a great difference between an executor and an administrator; so, for an executor, between a *nude executor*, who is only trustee, and one that hath *interest* by the will: that the ordinary is to take care that the will be performed; the testator made *Mills* executor, on supposal of him to be able: now he is a bankrupt; this, if known to the testator, had prevented his being executor; the ordinary is to see his express will performed; if circumstances alter, then his presumed will must be observed, in such manner as he would have done it. (d) The judge shall sometimes swerve from the testator's appointments, as if that a man be improvident or of ill manners, &c. And therefore as judge, did revoke the probate, and granted administration with the will annexed to *Gillam Hill*; the other children being beyond sea.

Afterwards RAINES told me, that the canon law looks upon an executor in general, as one that hath no interest, whose province is only to execute the will; that, by the same law, in case of a will to pious uses (and for cause of nurture was the same) an executor

(c) Co. Lit. 134.

(d) See the *DICEST*, de administratione et periculo tutor', lib. 3. artic. 3.

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is removeable for negligence, if nothing be done for the space of one year.

NOTE, The novelty and profit of this case engaged all THE DOCTOR'S zeal for it, &c. *sed mihi videtur fore dissonum legi comm.*

And the first day of Michaelmas Term, upon my motion on a suggestion of this matter, we had a PROHIBITION.

Michaelmas

• Michaelmas Term,

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The Third of William and Mary,

I N

T H E K I N G ' s B E N C H .

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Leach and others against Thompson.

Case 189.

Easter Term, 2 Will. & Mary, Roll 221.

ERROR in the King's Bench, upon a judgment, in the Common Pleas, for the plaintiff in ejectment; there brought by *Thomas Thompson* against *Sir Simon Leach* and others defendants, upon the demise of *Ch. Leach*, of the manor of *Bulktworthy*. Wherein upon not guilty pleaded, the jury find a special verdict.

That *Nich. Leach* was seised in fee of the manor and lands in the declaration; and, by his last will in writing, bearing date Decem-

without his knowledge or consent. Afterwards A. has a son born, and then B. accepts of the surrender, enters upon the estate, and suffers a recovery. This is a good surrender, although it was not accepted until after the birth of the son of A. and destroys the contingent remainder to him in tail; for the consent of the surrenderee is implied, and being a common law conveyance the bare grant without any other act divests the estate out of the surrenderor, and vests it in the surrenderee. S. C. Carth. 211. 250. 435. S. C. Comb. 438. 468. S. C. Holt 357. 623. 665. S. C. 3 Mod. 307. S. C. 2 Salk. 427. 565. 618. 675. S. C. 3 Salk. 300. S. C. 2 Vent. 198. Cro. Car. 502. Jones 405. 2 Roll Abr. 728. 2 Chan. Cal. 303. 2 Vern. 189. 3 Bac. Abr. 138. Dougl. 251. Fearn. 233. 241. 243.

A. being tenant for life with remainder to his first and other sons, and, in default of such issue, with remainder over to B. in tail, makes a surrender of the estate to B.

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ber 9, 19 Car. 2. demised the premises to his brother *Simon Leach* for life, remainder to the first son of the body of the said *Simon*, and the heirs males of the body of such first son; and in like manner to the second and third son, &c. and for want of such issue of the said *Simon Leach*, the remainder to *Sir Simon Leach*, and the heirs males of his body; and for want of such issue, to the right heirs of *Nicholas* the testator for ever: that the said *Nicholas* died seised of the premises, and after his decease the said *Simon* entered, and became seised for life, with remainder over as aforesaid; and, being so seised, made a deed bearing date 23 August, 25 Car. 2. sealed and delivered to the use of *Sir Simon Leach* (but he was not present) which deed the verdict sets forth *in hæc verba*, and by it he granted and surrendered unto the said *Sir Simon Leach*, and his heirs and assigns, the said manor and lands, and reversion and reversions, remainder and remainders, of the same; to have and to hold the same to the said *Sir Simon Leach* and his heirs, to the use of him and his heirs: and further, that the said *Ch. Leach* (the lessor of the plaintiff) the first son of the said *Simon Leach*, was born the * first of November, 25 Car. 2. and not before; and that *Simon Leach*, from the time of sealing the deed, to the 25th of May, 30 Car. 2. did continue possessed of the premises; and that then, and not before, *Sir Simon Leach* accepted and agreed to the said surrender, and entered into the premises; and that afterwards the said *Simon Leach*, brother of the said *Nicholas*, the testator, died, and the said *Charles Leach* the son, after his decease, entered and made the lease in the declaration mentioned to the plaintiff; who, by virtue thereof, entered, and was possessed, and so continued till the defendants, *Sir Simon Leach*, and others, ejected him. But whether, upon the whole matter, the said *Simon Leach* did surrender the said manor and premises to the said *Sir Simon Leach*, before the said *Charles* was born, they doubt; and if he did not surrender the said manor and premises to the said *Sir Simon Leach* before the birth of *Charles*, then they find the defendants guilty; and if he did surrender before the birth, then they find the defendants not guilty.

POWELL *Chief Justice*, and ROOKSBY *Justice*, after four arguments at the bar for the plaintiff, held, that it was no surrender, till such time as *Sir Simon Leach* had notice of the deed of surrender, and agreed to it, and so the remainder was vested in *Charles* the son, and not defeated by the agreement of *Sir Simon* after the birth: and judgment there was given for the plaintiff contrary to the opinion of VENTRIS. (a)

I ARGUED for the plaintiff in the writ of error. THE CASE is short was, *Simon Leach*, tenant for life, remainder to his first son, remainder in tail to *Sir Simon*; the tenant for life, before the birth of that son, by deed, sealed and delivered by him to the use of *Sir Simon*, (but in his absence, and without his notice) surrenders his estate to *Sir Simon*; he continues in possession till after the son is

(a) See the argument of VENTRIS, 2 Vent. 198.

born;

born; then *Sir Simon* agrees to the surrender, and then entered.—
THE QUESTIONS are two. *First*, Whether by the sealing of the deed to the use of *Sir Simon* in his absence, the estate immediately passed; if so, then the *contingent remainder* to the lessor of the plaintiff in the original action, could never vest, because the particular estate upon which it depended, was gone and determined; the consequence cannot be denied; for the law is plain, that if *Simon Leach's* estate for life was determined before the death of *Charles*, it is with my client. Then, *Secondly*, another question is, Whether the agreement afterwards shall not so relate, * as to make the land pass *ab initio*: but the first is that which I rely on, (and in truth I doubted the other, for that no relation to a precedent act could work so strong as to divest an estate vested, which was created by conveyance antecedent to the deed to which the relation must be (*b*); and therefore I pretended not to argue that, but only the other first question, *viz.* That the freehold and estate of *Simon*, tenant for life, did immediately by the deed, vest in *Sir Simon* before he had any notice, or gave any express assent to it; and so it was a surrender before *Charles* was born) that a surrender passes the estate immediately, even without any express assent, because it is a conveyance at the common law that needs no agreement, *Co. Lit.* 50. *Coke* enumerates the conveyances that work without livery, or other ceremony; he puts the cases of lease and release, confirmation, demise and surrender, amongst the rest: whereas, if the explicit agreement of the remainder-man or reversioner were a circumstance requisite to make it effectual, he would have mentioned it, and not have numbered it with those that need no other requisite than a bare deed that require no such assent. Then, if I can make it out to your lordship, that such common law conveyances need no expresser assents, to pass the estate out of the grantor, and that the reasons of the immediate passing of the estate in such cases, holds in surrenders, as well as other conveyances, then the inference will be easy. Conveyances at common law do immediately (on the execution of them upon the grantor's part) divest the estate out of him who makes the conveyance, and vests it in him to whom the conveyance is made. In case of conveyances, requiring a further act besides a deed, when all is done on the grantor's part, the estate passes immediately even without assent or notice; as in case of feoffments made to divers persons, and livery made to one feoffee in the absence of the rest; the estate vests in them all till disagreement; and so is the 18 *Edw.* 4. 12. expressly, and the same is cited and agreed for law in *Mutton's case*, 2 *Leon.* 223. that the freehold shall be adjudged in them all till they have disagreed: so an estate by livery to a *feme covert* vests in her presently before agreement of her husband, though the taking by livery could import no consent from her, for she was not able to give her assent by reason of her coverture, yet good till she disagree, *Co. Lit.* 3. 356. So it is in case of the grant of a reversion with attornment, the freehold passeth immediately by the deed, *Co. Lit.* 49. And

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(b) See 2 Term Rep. 490.

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the reason seems to be, because the grantor hath done all on his part. In case of a lease for years, the interest is vested before entry, and if either lessor or lessee, or both die before entry, the executors of the lessee shall hold it, *Co. Lit. 46. b. 51. b.* And if made to two, and one die before entry, the interest shall survive, and yet till entry no agreement may be had of the lessee. The reasons why any conveyance divests the estate upon the execution of all required on the grantor's part, do all of them hold in case of a surrender, as well as any other conveyance: they seem to be three.—FIRST. It is an absurdity and apparent incongruity, that when a conveyance is completely executed on the donor's part, that, notwithstanding, the estate should continue in him, when he hath done all he can to divest himself of it; as *Coke* in 1 *Inst. 217.* says, in case of livery, that it cannot stand with any reason, that against a man's own livery and seisin, the freehold should remain in himself, when there is a person capable to take. Now it is to the full as unreasonable, that the estate should remain in *Simon Leach* against his own deed of surrender, when he hath done all he can to part with it, and nothing further is required on his behalf; for in case of a surrender by deed, and sometimes words are as effectual without deed as livery in case of feoffments, I can see no reason for a difference. In the case of a release to the tenant in possession, the estate vests by deed immediately. Then there is a presumption in law, that it is for a man's advantage to take an estate, and so is it to have his reversion attached in possession: now no man can be supposed unwilling to that which is for his advantage: where an act is done for a man's benefit, an agreement is implied till there be a dissent. In the case of *Smallman v. Agborrow*, 1 *Rolls Rep. 441.* J. S. and a *feme sole* are jointenants for life, they intermarry, and make a lease of the wife's moiety rendring rent; *the feme* dies: held, that the lease binds the survivor, because, it being with a render of rent, it is intended to be for her benefit, and so good till express disagreement. Held also *e contra*; that if a *feme covert* grant a rent, the grant is absolutely void, because it cannot be for her benefit: so of an obligation: so if an infant lease land rendring rent, it is good till disagreement, but if without render it is void. A lease made to *baron* and *feme* for years, the *feme* shall have it, if she survive, because intended for her benefit, and consequently good till she disagree, and no need of an express agreement to make it good. An *assumpsit* to my servant or agent in my absence, is good to me till disagreement, *Hesley 176. Godb. 261.* This rule holds even in the gift of goods, as is resolved in the case of *Butler v. Baker*, 3 *Co. 26.* *; a grant of goods and chattels vests the property in the grantee before notice. A bond is sealed and delivered to a man's use, who dies before notice, his executors may bring an action upon it, *Dyer 167.* Which shews the general reason and intendment of the law, that what is for a man's benefit, it is supposed every man is for it; and I may be very confident, that *Sir Simon Leach* was always willing to have this estate: and as I said before, an estate made to a *feme covert*, vests in her immediately till her husband disagrees; and yet she cannot agree to bind herself: so is *Hob. 204.* And in pleading it

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is not necessary to aver his assent, for it vests till he disagrees; *Swayne v. Holman*, *Hutt.* 7, 8. Now, my lord, is there not the same presumption and appearance of benefit to him in reversion in the case of surrender? is it not a palpable advantage to him to determine the particular estate, and to reduce his own into possession? and therefore there can be no reason why an assent should not be implied in surrenders, as well as other conveyances. THEN FURTHER; the law will not allow or suffer the operation of a conveyance to be in suspense, and to expect the agreement of the party to whom it is made, because the care of the law is to prevent an uncertainty of the freehold: this seems the great reason, why a freehold cannot be granted *in futuro*, because it would be hard and inconvenient, that a man should be driven to bring his *precipe* or real action first against a grantor, and after he had proceeded in it a great while, it should abate by a translation of the freehold to a stranger, by reason of his agreement afterwards to some conveyance made before the writ brought; for, my lord, this must be the reason, or there is none at all, for there is nothing in the nature of the thing which can be called a reason against passing of a freehold *in futuro*; for a rent *de novo* may be granted to commence *in futuro*, because that being newly created, there can be no precedent right to bring any real action for it, *Palmer's Rep.* 29, 30. Now all the uncertainty, which the law abhors of a freehold, must follow in this case of a surrender, if nothing pass till an agreement. BESIDES, pray do but consider the convenience and inconvenience of each opinion, and it will be apparently manifest, that the balance is on our side, notwithstanding the objection which I expect to hear from the other side. Suppose in this case, a *precipe* had been brought against *Simon Leach* the tenant, this would have proceeded according to their opinion, and he could not have pleaded in abatement till *Sir Simon* had agreed; and after a long progress in the suit, he might have pleaded an agreement * of *Sir Simon's puis darrein continuance*, and defeated all; and I see no reason why any such plea should not be admitted; so that the same inconvenience, as to the bringing of real actions, holds in case of surrenders, as of other conveyances. Now, on the other side, you say, that if a *precipe* had been brought against *Sir Simon Leach*, he might have pleaded his disagreement, and so have abated the writ by "non-tenure." I ANSWER. That must be agreed; but it is no greater inconvenience, than the plea of "non-tenure" is in all other cases whatsoever; besides, it must have abated the writ immediately, for he could not have abated the writ by any disagreement after he had answered to it; when, as in the other cases, it might be pleaded *puis darrein continuance*, and consequently after a long progress in the suit; besides, it is more improbable that he should disagree, than the other; for an assent to take, is the likeliest thing in the world, so that the mischief to a demandant is neither so great, nor so probable as in their case.—As to the inconvenience of making a deed of surrender, and continuing in possession, and thereby destroying and defeating of recovery, settlement, and charges. I ANSWER, This holds too frequently in other conveyances, and yet in these the freehold vests immediately, though a disagree-

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ment doth afterwards divest it. Besides, they must agree, that an express assent will make a surrender effectual, though the surrenderee do not enter, and consequently though the assent may be as great a secret as the deed, yet it vests the estate in him; so that the objection as to strangers, by continuing in possession, holds as well in their opinion, as in that which I contend for; for the estate vests before entry, though it cannot maintain trespass before entry, and that assent of their's might be kept as private, and consequently all the mischiefs pretended would follow, as much as if no express assent were requisite: that he is become tenant before entry, and must be so sued in a *precipe*, are full authorities, *Bro. Tit. "Surrender,"* 50 *Hutt.* 95.—As to THE OBJECTION, That in case of a surrender, an actual assent is necessary, as attornment is to the grant of a reversion, or livery to a feoffment, or execution by entry in exchange. I DENY that assent is necessary as a circumstance, but do, and must agree it an essential to all conveyances; for every conveyance supposes, that there are two persons, and that both assent; and if that assent be denied, it annuls the conveyance: but that which I do affirm is, that it is not required as a circumstance, as livery and attornment are, to perfect the conveyance; * for an assent in all conveyances is implied in him that takes, and this by intendment of law which is as strong as the expression of the party, till the contrary do appear, and there is no conveyance at common law that doth not work immediately when the grantor hath done all on his part:—but perhaps they OBJECT, that *exchanges* do not work immediately. I ANSWER, That stands upon a particular reason; there must be an express mutual assent, because there must be a mutual reciprocal grant, as appears by *Litt. Sect. 13. Finchs Ley.* 27. But in case of a surrender, there is nothing to be done on the reverfioner's part, but to take, and that the law intends a man willing to do till disagreement appears.—OBJECTION. That in copyhold surrenders the estate still remains in the surrenderor, *Frofil v. Welch, Cro. Jac.* 403. ANSWER. That is founded upon the particular custom, and cannot be urged as a reason in this case; besides, the reason is plain there, that the lord may have a tenant for his services, and if it should not be in him, it could be in nobody; the custom will not admit it in the *cestui que use* of the surrender, because not so much as a presentment; and the lord is not capable of having it, because the surrender is *quasi* conditional to him, and not to his use.—OBJECTION. That this is like to the resignation of a benefice, which cannot be pleaded as good till acceptance by the bishop, as *Bro. tit. Barr.* 81. *Noy* 147. *Cro. Jac.* 197. 7 *Edw.* 4. 16. 9 *Ed.* 4. 49.—ANSWER. That is no way to be compared to this case; for that is an ecclesiastical matter, and founded rather upon an ecclesiastical reason; the resignation is of *the cure*, rather than *the benefice*, though the one follows the other; the resignation is not to a man interested; the bishop acquires no interest therein by such a resignation, it is made to him as a spiritual judge and father, who (by reason of his own jurisdiction, and the priest's obedience) hath power to judge if convenient for the church, and no *formedon* lies of a rectory, for there is

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is neither *remainder*, *reverter* or *descender* of that; perhaps by THE CANON LAW the ordinary may refuse or censure him, if he resign a cure he is best qualified for; and yet the resignation of a donation to one of two founders enures to both. *Fairchild v. Gaire*, Cro. Jac. 63. Whereas a surrender is *quasi* a dereliction or quitting of the land or his estate in it, and thereby the reversion or remainder takes possession immediately, the freehold is transferred * immediately for fear of a suspension of that freehold; there is no such fear or care in case of parsonages, because they have their provision. In a vacancy the ordinary is to take care for the supply of the cure, and may apply the profits thereof for a reward to him that shall actually officiate therein. A surrender is *quasi*, a grant of the term or particular estate; and so it is held in the case of *Peto v. Pemberton*, Cro. Car. 101. And being a grant, no man can question but what passes by grant, doth vest immediately, and so continues till disagreement. A surrender or *sursum redditio* doth not *ex vi termini*, import or require any express agreement of the reversioner, only a dereliction of his own estate and his assent, that the other shall take and enjoy it; this is all that the word can import.—OBJECTION, That there is found in the verdict an acceptance and entry, such a day, and not before, and no agreement can be intended contrary to what the jury find.—ANSWER. I confess there are some such unkind words inserted in the verdict, but that will not alter the case; for if the law do not require an express agreement, no more than it doth an assent on the lessee's part, in case of a lease and release, then upon the execution of all on the grantor's part the freehold passed, and that immediately; and then this finding no way alters the case: for if the estate passed before the express assent, if upon the act of the grantor, that act being for the reversioner's advantage, the law implied an assent till the contrary appeared. Then the finding of the agreement doth no ways alter the case, and the words "and not before" are repugnant, and therefore void, because the law implied an assent at first, and no disagreement being found, it is a good consequence of the freehold immediately.—OBJECTION. That in the pleading of a surrender, it is generally said *ad quod agreeavit*, and that the forms of pleading shew what the law is in that case, as *Rast. Entr.* 176, 177. *Fitz. tit. Bar.* 262. I ANSWER *First*, These are all in actions which are brought in a disaffirmance of the surrender, and do import a disagreement, and therefore the defendant has no means to bar, or avoid such agreement, but by shewing an express agreement before: as in debt for rent, the defendant pleads a surrender before the rent became due; the bringing the action was a disagreement, and therefore an express agreement before was pleaded: so in waste. Of the same nature, is the case of *Peto v. Pemberton*, Cro. Car. 101. in replevin, the avowry was for a rent-charge; it is pleaded in bar of the avowry, that the plaintiff demised the land out * of which the rent issued to the avowant; the avowant replies, that he surrendered *dimission. pred.*; to which the plaintiff agreed: this is of the same nature with pleading it in bar to an action of debt for rent: but when the action is in pursuance of the surrender, then it is not pleaded; so is *Rastall Ent.* 136. in covenant for ejecting him; and the

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the defendant pleads a surrender in bar without any acceptance. *Secondly*, It is not universally so, for in *Fitz. tit. Debt*, 149. Debe for rent; defendant pleads in bar, that he surrendered, by force of which he became seised; there is no mention of pleading any agreement, though that action was in disaffirmance of the surrender. *Thirdly*, If an agreement be necessary to be pleaded, that is fulfilled by an implied, as well as by an express assent: suppose lessee for life should make a lease for years reserving rent, and in debt for the rent, the lessee should plead, that the plaintiff, before the rent grew due, did surrender to him in reversion, and he accepted, and issue taken upon the acceptance, and at the trial it be proved, that the plaintiff had executed a deed of surrender (as it is here) to him in reversion in his absence; would not this turn the *onus probandi* upon the plaintiff, that he disagreed to the surrender? surely his agreement *prima facie* would be presumed, and then the rule is *stabit præsumptio donec probetur in contrarium*. It is not always pleaded; and when pleaded, it is upon a special reason, to conclude the party from disagreeing. *Fourthly*, No argument can be had from this pleading, to make any forceable conclusion in the point; for admit an express assent necessary, it cannot be needful to be pleaded; for if it be a necessary circumstance to the conveyance, as livery, then *sursum reddidit* implies it, because it cannot be a surrender without it; as feoffment implies livery, because no feoffment without it, *Cro. Car.* 162. and 181. Now it is an odd way of arguing, to infer, that the law is so in a point, because the pleading is so; whereas, if the law be as they say, the pleading need not be so.—OBJECTION. The description of a surrender in the books is with an assent, *Co. Lit.* 337. That the surrendering is the yielding up an estate which drowns by mutual agreements between them, *Perkins, cap. Surrender, Sect.* 608, 609. To this I give two answers. *First*, That every conveyance requires the consent of both parties, and an agreement is necessary; but the question is, whether an agreement is not intended where a deed of surrender is made in the absence of him in reversion? whether the law will not suppose an assent, till a disagreement * appears? If the reversioner were present, he must agree, or disagree immediately; and so it is in all other conveyances; and so are all the cases put by *Perkins* of surrenders made to the lessor in person; the words of the book are, “the lessee comes to the lessor, and saith *I surrender*.” *Perkins* saith, “If the lessor do not agree it is void, for a surrender cannot be against his will:” this may be all true, and yet what we contend for, may be law too; for by no conveyance can a man have an estate put into him against his will and by force: but it will be hard to shew a book-case adjudged, where a deed of surrender is executed in the absence of the reversioner, and that nothing passes till he consents. I do agree, that a disagreement will null it, and so it will in a case of a lease for years made in absence, fine, feoffment, grant with attornment, bargain and sale, yet then the term vests before agreement or notice. The inconveniences would be infinite, if a surrender could not operate till an express assent of the surrenderee, for then no surrender could be to an infant, at least when under the years of discretion;

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creation; for if it be a necessary circumstance, it cannot be omitted in any case, no more than livery or attornment; so although an infant of a month old is by law capable to take an estate, because it is for his advantage, yet he must not take a particular estate upon which he hath a reversion expectant, because it must enure by way of surrender; and yet an infant by our law, is capable of being a surrenderee, as well as a grantee; for whosoever is capable of a surrender, is capable of a grant. Tenant for life, and he in reversion for life, may surrender without deed, and the estate of him in reversion shall be surrendered by it; for it seems this shall enure, as a surrender of the first estate for life to the next, and so it is a surrender of an estate in possession, 27 *Aff.* 46. 2 *Rolls Abr.* 498. Now here the reversioner for life never agreed to take any estate from the first lessee. By *Co. Lit.* 192. 214. if there be two jointenants in reversion, a surrender to one enures to both; by which it is plain, that, as to one moiety, the deed of surrender operated without assent, or notice, *Bro. Sur.* 39. Suppose tenant for life should make livery upon a grant of his estate to him in reversion and two others, and the livery be made to the others in the absence and without the notice of the reversioner, this livery surely shall work immediately, even as to the whole estate; and if it doth, it must enure as a surrender for a third part; so is *Bro. tit. Sur.* 11. Suppose * tenant for life of *Black Acre* should by lease and release, convey *Black Acre* and *White Acre* to him in the reversion, who hath no notice, must not *Black Acre* pass till notice and assent, and *White Acre* pass immediately? for *Black Acre* must pass by way of surrender, and in pleading you must say *sursum reddidit*.—OBJECTION. The case of *Perryn v. Aller*, in *Owen's Rep.* 97. It is there said, that to make a good surrender, there must be an immediate reversion in the surrenderee, possession in the surrenderor, and an agreement of the parties. I ANSWER. That case can be of no authority in this point, for that was tenant for years, the reversioner for years covenants and agrees with J. S. that the tenant should enjoy the land for a longer term; and the question was, if that were a surrender? and held not, and with good reason; for undoubtedly the consent of the tenant is necessary, and there could be none intended, and the tenant was no party to the deed, but a perfect stranger; and the intent and agreement of the parties to the articles, was undoubtedly that it should not extinguish the other term, and it was intended a surrender by nobody; besides, there is a better reason than all this given, *viz.* because a lesser term could not merge in a greater, the reversioner being but for years; and ANDERSON, and the rest, go upon another notion, that a covenant between two, that a third man shall enjoy land, is no lease; further, the report can carry no great authority with it; the case is oddly put: a man seised of land by lease for thirty years makes, &c. A grant of a reversion may be with attornment without assent or notice, for attornment may be in the absence of the grantee, by an assent declared on hearing the deed, which was only sealed and delivered to the use of J. S. *Co. Lit.* 310. *Bro. tit. Attor.* 40. *Tooker's case*, 2 *Co.* 68. Then we are here in a case where is only a contingent remainder, which is but a kind of
scintilla

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scintilla juris, and not much favoured in law. Upon this surrender hath been a long and quiet possession, and two marriage settlements. And therefore I prayed a reversal of the judgment in the Common Pleas.

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NOTE, I did not argue the point of relation, for that I doubted it was hard to maintain so strong a relation, the remainder being by title antecedent to the surrender, it being vested in *Charles* by virtue of the will, and so paramount the surrender to which the assent must relate; and consequently no relation to that deed of surrender shall divest an estate inveited by virtue or force of a will or conveyance executed before that: * if an estate arise to one upon a contingency, or a power be reserved upon a fine or feoffment to uses, when once raised or vested, it relates to the fine or feoffment, as if immediately limited thereupon, 1 Co. 133. 156. If the husband discontinue the wife's estate, and then the discontinuer conveys back the estate to the wife in the absence of the husband, who, so soon as he knows of it, disagrees to it; this shall not take away the remitter which the law wrought upon her first taking the estate from the discontinuer, Co. Lit. 356. Jones 78; because she is in of a title paramount to the conveyance, to which the disagreement relates; and the same rule holds for agreement: and of this opinion was all the Court of Common Pleas; and therefore I stirred not this point.

MR. ROW argued *e contra*, that in a surrender the mutual assent of the parties is necessary; that a particular tenant cannot throw up his estate, *nolens volens* to the reversioner; that a surrender pleaded without assent, is ill; that a surrender is like a resignation; that an assent cannot be presumed when it is found that he did not agree till five years after. He cited *Winch's Ent.* 477. *Palm.* 344. *Dyer* 110. 9 Ed. 3. 76. *Cro. Jac.* 197. *Sid.* 75. *Cro. Eliz.* 487. 31 Aff. pl. 25. *Bro. tit. Debt*, 93, 94. *Kelw.* 194, 195. *Dyer* 258. 2 Leon. 192.

LEVINS *Serjeant*, the next term, argued for the plaintiff in the writ of error; that the estate passes generally by the act of the grantor, Co. Lit. 110; that even in the grant of a reversion it passes between the parties immediately; that in releases no consent is necessary: he cited *Raft. Ent. in Debt Release*, 1. 136. Co. Ent. 188. *Dyer* 167. Co. Lit. 266. 2 Inst. 674; that if a lease be made for years with condition of accruer, the estate passes presently; that exchanges stand upon another reason, for there must be mutual acts; that a grant may be pleaded without assent, and this is found as a release and grant. It is true, the grant turns by operation of law into a surrender, but still it is a grant; here it is a good grant: now there is nobody's consent required to that, but his own: here it first works as a grant: then if the estate were out of *Simon Leach*, it matters not where, the contingency is destroyed.

GOLDS *e contra*. That the jury make a special conclusion, if the said *Simon Leach* surrendered or not, which destroys the notion of passing

passing as a grant: then, that no estate passes at common law without livery, entry, or agreement, unless in case of an estoppel; that whoever comes to an estate by any conveyance, is called a purchaser; now by *Co. Lit.* 3. "purchase" is where a man comes to land *per son fait* on agreement; that even in surrenders in law it is the acceptance or agreement of the parties that makes them good: he cited 2 *Rolls Abr.* 787. 12 *Edw.* 4. 3. *Perkins tit. Grant, sect.* 1. 13 *Hen.* 7. 26, 27. *Plowd.* 87. *B.* 21 *Hen.* 7. 6. And therefore concluded, that no assent being had to the surrender, till after the birth of *Charles*, it was a void surrender.

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HOLT Chief Justice. As to the words "release and grant" in the deed, they signify nothing; for a grant in this case could be of no avail without livery: though the words of the deed be "grant," yet it must be pleaded as a surrender, and not otherwise: a surrender is a particular sort of conveyance, and agreement is necessary to perfect it.

And so judgment was affirmed.

And afterwards that judgment was reversed in the House of Lords;
omnibus baronibus pour mon client. (c)

(c) See S. C. 3 Mod. 301. S. C. 2 Vent. 208. See also Show. P. C. 151. accord'. But the reversal was contrary to the opinions of all the judges, except VEN-
TRES Chief Justice, and ATKINS Chief Baron, S. C. 3 Lev. 285. S. C. Carth. 250. See also 4 Com. Dig. 509. In Hilary Term, 9 Will. 3. another judgment was brought on a new demise by *Charles Leach*, S. C. Comy. 45. in which there was another special verdict finding, besides the facts as above mentioned, that *Simon Leach* the tenant for life was not *compos mentis* at the time of the sealing and delivery of the said surrender, S. C. 3 Mod. 302. and which he had been induced to make by his wife's father, S. C. Carth. 435. Two points were made, FIRST, whether the surrender, being made by a person *non compos mentis*, was void *ab initio*; or if not, SECONDLY, whether the lessor of the plaintiff *Charles*

Leach, claiming by virtue of a collateral remainder, and not as heir at law to the devisor, could take advantage of his father's lunacy. S. C. 3 Mod. 302. and HOLT Chief Justice, and all the other judges of the King's Bench, were of opinion that this deed of surrender was absolutely void, S. C. 1 Ld. Ray. 315. and that all persons may take advantage of it. S. C. 3 Mod. 311. for being made by a person *non compos mentis*, it never could have any effect in law, S. C. Carth. 436. except as against the surrenderor himself, S. C. Comy. 47. a writ of error, however, was brought in the House of Lords, where the second question was again elaborately argued, but the judgment was affirmed. S. C. Show. P. C. 150. S. C. 12 Mod. 173. See *Gilbert's Uses*, 140. Dougl. 50, and 3 *Danvers*, Abr. 164. notis.

Case 190.

Bird against Geary.

Hilary Term, 2 William and Mary, Roll 433.

In *assumpsit*, if the consideration be executory, it ought to be precisely alleged according to the agreement, but if the averment agree substantially with the thing to be performed, it will be good after verdict.

Hard. 103.

1 Selk. 65.

5 Com. Dig. 5c.

Comp. 826.

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ACTION on the case *pro eo quod cum* the plaintiff in Easter Term, in such a year in the King's Bench, had recovered against one T. G. *tam quoddam debit.* six hundred pounds, *quam* fifty shillings *pro misis*, and had sued a *feri facias* to the sheriff of M. directed, and divers goods to the value of four hundred pounds were seized, and in execution detained by virtue of the *feri facias*, and the said T. G. had paid and satisfied all the monies due on the said judgment, except two hundred pounds for principal, and thirty-eight pounds five shillings for interest and costs in obtaining the said judgment, and levying execution aforesaid; and that one hundred pounds of the said two hundred pounds was in trust for one J. F. And whereas the goods and chattels aforesaid in execution aforesaid, and in possession of the bailiff, being a certain agreement was had between the said plaintiff and defendant, and the said T. G. *viz.* That the said defendant should give to the plaintiff a bond for payment of one hundred pounds of the said two hundred pounds, and another bond for the other one hundred pounds to the said J. F. and that the plaintiff should assign and transfer to the said defendant, all the benefit of the said judgment and execution to his own proper use without any account to be rendered to the said plaintiff; and should permit, and do, and execute all things necessary thereunto; and that the goods aforesaid should be sold, assigned, and delivered to the defendant *de et ex bonis et catallis pred. ac monet. proinde fact.* should on request pay the plaintiff all his interest and costs: that the defendant (in consideration of the plaintiff's promise to perform his part) avers, that bonds were given in pursuance of the said agreements; and that the plaintiff (by writing under his hand and seal) did assign to the defendant the judgment and debt, * and damages aforesaid, and all the benefit thereof *nec non execut. pred.* and made him his attorney without account, to receive to his own use; that the defendant *abinde hucusque tot' benefic' pred' nec non execut. pred. ad usu' suu' propr. sine aliquo computo inde querenti facti. habuit et recepit*; that the interest and costs amounted to thirty-eight pounds five shillings and were demanded, and not paid. *Non assumpsit*, and verdict for the plaintiff.

I MOVED in arrest of judgment, that our promise was special and conditional to pay out of the goods and chattels, and the money thereby made; so that by the *agreement* we were to pay nothing till the goods were disposed of by us: now, for any thing that appears by the declaration, the goods do remain in our hands, and then we were not to pay; for their very averment supposes it, *viz.* that from such a time hitherto, we had the benefit of the judgment and the execution, which supposes a continuance of the goods in our hands, and

no money raised out of the goods; and the raising of the monies out of the goods, was the consideration, and that being *executory*, must be precisely alledged to be performed.

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But *PER CURIAM non allocatur*, because after a verdict.

And EYRES *Justice* said, that the case of *Marten v. Bowes, Cro. Jac. 7.* was much a stronger case than this; and yet held, that the thing averred, being the same in substance with the matter of the agreement, it was well enough.

Judgment for the plaintiff.

The King against Lady Oneby, alias Truder.

Case 191.

INDICTMENT for not coming to any church or chapel for the space of a month, *contra formam statuti*. For want of appearance, process of outlawry issues, and an *exigent* is returned thereupon.

An outlawry for not coming to church reversed for not stating that THE COUNTY COURT was held in and for the county.

The defendant brings a writ of error to reverse the outlawry, and the error which I assigned *ore tenus* was the usual fault, in not saying *the county court* was held *pro comitat.* (a)

2 Roll. Abr. 802.
3 Mod. 89.

2 Roll. Rep. 52. 1 Keb. 50. 2 Keb. 128. 1 Vent. 108. 2 Shower, 60.

OBJECTION per Curiam. The 3 Jac. 1. c. 4. s. 16. That no indictment, &c. nor any proclamation, *outlawry*, or other proceeding thereupon shall be avoided, discharged, or reversed, by reason of any defect in form, or lack of form, or other defect whatsoever, "other than by direct traverse to the point, of not coming to a church," whereof such person or persons shall be indicted, but the same indictment shall stand, and be in force, and be proceeded upon, any such defect of form, or other defect whatsoever notwithstanding.

An outlawry on an indictment for not coming to church, may be reversed for defect of form.

To the which I answered, at another day, that it is true, the statute includes outlawry and proclamation, and * says, none of them shall be annulled for any lack of form; but if that construction be made of it, then it will be inconsistent and contradictory in itself. Now this is all but one entire sentence, and the whole must be taken together; the latter words must explain or controul the former, else no outlawry can be reversed at all, but upon *conformity*; whereas the statute says, "other than by direct traverse to the point of not coming to church," and that the indictment shall stand

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(a) See the case of *Rex v. Wilkes*, 4 Burr. 2527. where an outlawry was reversed because, in the sheriff's return to the *capias cum proclamatione*, the name of the county in which the county court was situated was not stated; and because the county court was not stated to be held "for the county." This objection was also taken in *Rex v. Barrington*, 3 Term. Rep.

500. and the Court seemed to think that it would not now prevail; but the outlawry was reversed on another point: and in the case of *Rex v. Tandel*, the writ of proclamation required the sheriff to proclaim the parties in open court in the sheriff's county, not saying *county court*, and held good. 4 Term. Rep. 521. 539.

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good, which admits it may be reversed; but then the party must plead *not guilty* to the indictment. Several outlawries were reversed in the LORD SCROGG's time. I confess I cannot remember that notice was taken of this objection.

But at last the outlawry was reversed, and she pleaded not guilty, and this *PER TOTAM CURIAM*.

Case 192.

Cudlip against Rundli.

Trinity Term, 3 William and Mary, Roll 646.

If a lessee for years of two houses, the one new and the other old, underlet the premises for seven years, "excepting and reserving THE NEW HOUSE for the use of the lessor if he shall please to dwell therein, but not to be let to any other person, and at all times when he does not live there to be to the use of the lessee," this new house is not demised, and the lessee, by occupying it, becomes merely a tenant at will, so that if a fire accidentally happens therein, the landlord cannot maintain an action against him for negligence.

S. C. 4 Mod. 9.
S. C. Carth.
202.
S. C. Comb.
177.
S. C. 3 Salk.
156.
S. C. 12 Mod.
14.
S. C. Holt. 410.
Touch. 78.

DECLARATION in case *pro eo quod* the plaintiff on the twenty-fifth of March, 36 Car. 2. was possessor of an house with the appurtenances for a term of years, then, and yet to come; and being so possessor, did, by indenture, demise the premises to the defendant for seven years then next ensuing; by virtue whereof the defendant entered, and was thereof possessor; and so being possessor, and the plaintiff possessor of the reversion thereof, the defendant afterwards, the 8th November in the year, &c. *ignem suum in domo pred. tam negligenter custodivit*, that the house was burnt, to his damage of three hundred pounds. The Defendant pleads *non dimisit modo et forma prout querens narr.* Issue thereupon.

THE JURY find, that the plaintiff on the twenty-fifth of March, was possessor of the premises for a certain term of years, then and yet to come; and being so possessed by indenture then made, in consideration of the rent and covenants thereafter mentioned, he did "demise, grant, and to farm let for herbage pasture and tillage to the said defendant his executors and assigns, all that one messuage or tenement with the appurtenances commonly known by the name of *Ugbear* situate in *Tavistock*, and then in the tenure of the said *Cudlip* or assigns, together with all houses, out-houses, structures, ways, waters, watercourses, profits and commodities thereunto belonging, or in anywise appertaining, excepting, and always reserving out of the said demise and lease, to the plaintiff his executors and administrators, the house commonly called *The New House*, new built upon the premises, for the use only of the father of the said plaintiff and himself, and their wives and family to live in, if they please, but not to be let to any person or persons whatsoever, and at all other times when they shall not dwell there to be used by the defendant, his executors and assigns; and also except one nursery, with the trees therein growing, to the plaintiff, his executors and assigns, during the term after mentioned; to hold the premises (except before excepted) to the defendant his executors and assigns for seven years, &c." That at the time of the lease made, there were two houses upon the premises, one old one, and one new built; that the new built house only was burnt; that at the time of the fire, the defendant was in possession of the new built house (except one room which the plaintiff had) and that the new built

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built house was burnt by fire made, and negligently kept by the defendant in that part of the house then in his possession, *et si, &c.* to his damage one hundred pounds; *et si* for the defendant *pro defend.*

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FOR THE PLAINTIFF. There have been many queries started in this case at the bar, and by your lordships.—*First*, Whether this action lies against an *under lessee*.—*Secondly*, If there be any reversion in the plaintiff to found this action.—*Thirdly*, If this be such a demise as we have declared on, supposing it a tenancy at will, if that so found maintains our declaration; nay, if here be any demise for years; and this last I shall endeavour to maintain. *FIRST*, If this new house did pass, or was excepted. And with submission, *MY LORD*, it is not excepted, because the exception is qualified. We are here in the case of a lease, where every word is to be so construed as to have a due and full sense if the rules of law will permit it; and no such construction is to be made or allowed as shall reject or make void any part or clause of the deed, if, by any other construction consistent with the rules of law, they may be made to have a sense. And this is a rule in all laws, and in our's especially, for which I might cite many cases. Now * these words "for the use of, &c." must be void if their construction hold, for then they are of no service; whereas, I say, these words shall qualify the sense of the general word "except," and then the term and interest passes. But a *liberty* or *usage* is reserved to the lessor. It is true, the first words are strong; but then the subsequent ones explain their sense; the intent is to be gathered from the whole contexture: the words subsequent explain their meaning, "and at all other times the lessee, his executors and assigns are to have it," that plainly denotes an interest vested to be their intent, which should go in succession to the parties representative; whereas the benefit of the use to the lessor was only personal, and extended no further than to him and his father: no words of interest used, nor so much as executors are there named. *THEN* the next exception shews their different meaning, *viz.* "except during the term." There was a total exception designed of the nursery, here is only a personal occupation reserved, which only doth amount to a covenant; and the different form of penning, shews the different intent of the parties in the several exceptions; so that the interest of the thing was never designed to be excepted in the first; for, if so, then they would have used the same words as in the last; and this answers the objection of the "except as before excepted" in the *habendum*, for that is sufficiently fulfilled by the exception of the nursery, which is total and compleat, and during the whole term. That this exception ought to be construed according to the sense I would put upon it, there is the reason of the law for it. He agreed, that these words used in a will, may give an interest, and pass the thing to be used, and so is *Matthew Manning's case*, 8 Co. 94. because of the intent, but that implies it should be otherwise in a deed; nay, though it should pass the thing itself in the case of a grant, yet it will not reserve it in an exception, for that the words of an exception are the words of the lessor, and to be construed most strongly *contra proferentem*, and so is *Bro. tit. Except. pl. 2.*

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4 Hen. 8. pl. 1. and the case of *Ive v. Sam; Cro. Eliz.* 522. does contradict as to the exception of woods, that that excepts the soil. Yet it must be agreed still, that an exception is to be construed most strongly against the exceptor, because his words, *Plowd.* 103. 171. In wills, covenants, and all agreements, (and a lease is but an agreement) the latter part shall explain, qualify, restrain, or enlarge the general words precedent, especially if in one sentence. The books are plentiful in this matter, whether the restrictive words are precedent or subsequent, as in *Dyer* 240. termor * for years assigns his term, and covenants, that he hath not made any former grant, or done any thing, whereby the said assignment should be impaired or frustrated, but that the assignees might quietly enjoy without the disturbance of any person; held, that the general words shall be restrained and limited by the exposition of the particular ones. So *Dyer* 255. Condition to suffer the obligee quietly to hold the lands during the term, and that without the trouble of any person; held, that the general words shall be restrained by the particular. Nor is there one case to the contrary: *Sir Geo. Trenchard's case, Winch.* 91, 92. and *Litt. Rep.* 92, 95. Covenant, that he was seised in fee, and that he had power to sell, and that no reversion was in the crown notwithstanding any act done by the covenantor; the last words, "notwithstanding any act," do restrain the general sense of both the former covenants. And in all the cases on this topic it is agreed, that the general shall be restrained by the particular, if they are but one entire sentence: here they are undoubtedly but one. The case of *Gainsford v. Griffith*, 1 *Saund.* 60. agrees that point. In that case of *Sir George Trenchard* as reported by *Littleton* there are many cases quoted which deserve not a repetition before your lordship. THEN this exception seems repugnant, and therefore void, as if I grant *totam partem piscar' mei salvo mihi piscario meo*; this is a void exception, because repugnant and contrary to the first grant, *Bro. tit. "Reservat."* 23. Grant of twenty acres, reserving or excepting one, are void because repugnant, *Co. Lit.* 47. Lease of a manor except the courts and profits, exception void. *Moore* 870. *Dyer* 96, 97. Express authority is *Dyer* 264. Lease of an house in *Fleet-street*, with all chambers, cellars, and shops thereunto belonging, except the shops for his use; and held a void exception, and that for two reasons, both which hold in our case, viz. the first per DYER, the exception was but special and temporary, viz. during the occupation and use of the lessor himself, and the premises were leased generally. Then SECONDLY, the shops were by express words demised; it was expressly said "all shops," and the exception being contrary to the express words of the grant is void; and this was DYER's opinion contra WESTON. And then at last is added, *et sic fuit opinio aliorum iusticiariorum tandem*. This is direct: but I confess, that Mr. Row did cite 1 *And.* 52. And there the case (by the name of *Homeby v. Clifton*) is otherwise reported; but my LORD DYER says, that such at length was the opinion of the other justices; so that on first argument, the opinion might be as ANDERSON puts it. Besides, his reports * are imperfect; they take

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take notice only of the reason of its being special and temporary, as idle and void. Besides, there was a total use reserved; here it is "at other times for the defendant and his assigns," and he takes no notice of the argument from the repugnancy, which is the stronger reason of the two: it is true, the report of *Novel Bendlowes* 181. is agreeable to *Anderfon*; but that is plainly mistaken, for it refers to *Dyer*, which see accordingly, whereas it is plainly with us: but to support the authority of *Dyer*, there is the opinion of my Lord *Hobart* exactly concurring, who quoted this case out of my Lord *Dyer* as good authority, in his argument in the case of *Stukeley v. Butler*, which was Hilary Term, 12 Jac. 1. it is fol. 170. and several others, *Kenson v. Reading*, Cro. Eliz. 244. 2 Roll. Abr. 454. where specially expressed before the exception made, as in the case of underwoods reservations and exceptions shall be void, rather than the intent of the grant shall be frustrated, as *Dorvil v. Collins*, Cro. Eliz. 6. *Arden v. Dennis*, Lane's Rep. 68, 69. 7 Hen. 6. pl. 43. Out of a general, a part may be excepted, but not a part out of a certainty, *Dyer* 97. And the true reason is, because the intent, where apparent, shall never be falsified; where it is not particular, an exception may explain it.

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SECONDLY, Then if here be any reversion in the plaintiff. That appears well enough, for it is said that the plaintiff, being possessed of a certain term of years, he made him a lease for seven years, by virtue whereof he entered, and was possessed: "that the plaintiff being possessed of the reversion thereof for a certain term of years," which could not be, if he had assigned the whole term. Further, the jury find us possessed of the reversion for a term, then, and yet to come, which was at the time of the finding. There are no words of assignment of, &c. but only of a grant and demise. It must now be intended so, since the jury have found a particular matter, and referred it to the court, every thing else ought to be intended, according to *Goodale's case*, 5 Co. 96, 97. The court on a special verdict shall never doubt of any thing, but that which the jury doubt of, and have referred to their consideration, and all other matters shall be supplied and intended. Here the issue is *non dimisit*, and the jury have found a deed of demise in consideration of a rent reserved, and that could not be, if his term were no longer than seven years: and they find, that upon the demise premises, there were two houses, and their conclusion is special; "if by this indenture the house passed, then for the plaintiff; if otherwise, for the defendant." Therefore all other things shall be intended, as in the case of *Caslie v. Hobbs*, Cro. Car. 21, 22. and *Saund. v. Rich*, Styles 278, 279. Special verdict on a will, the dying seised of the devisor, shall be * intended.—But of this point THE COURT made no doubt, though THE CHIEF JUSTICE at first objected it.

On a declaration in case that the plaintiff was possessed of a term of years, and the same day demised it for seven years, it shall be intended that the reversion is in the plaintiff. Dougl. 183.

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THEN, that this action lies, was agreed by Row, and must be so if the house passed by the lease; for the reason of the Countess of keeping a fire, &c. lies by a lessee for years against his under-lessee. — *Dyer* 121. 3 Lev. 356. 5 Mod. 181. 4 Mod. 12. Noy's Max. 44. Skin. 681. 1 Salk. 13. 19. Comy. Rep. 32. 1 Bl. Com. 431. 1 Bac. Abr. 55. 242. Ld. Ray. 188. 2 Will. 145. Dougl. 183. 1 Term Rep. 12. 430. 480. 535. 2 Term Rep. 166. 232.

An action on the case for negligently

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Salop's case, 5 Co. 13. and *Cro. Eliz.* 777, 784. was, because tenant at will was not liable for permissive waste, either by common law, or by statute; and the lessor was seized in fee, and not liable over for any waste done: but here is a lessee for years under us; if he were assignee of the whole term, no waste lies against us, but only against the assignee for waste done after the assignment, *Co. Lit.* 54. 2 *Inst.* 302. because he is the holder. But we are in the case of an under lease, and it must be agreed that waste lies against us, *Lewkner v. Ford*, 1 *Leen.* 48, 49. and the case of *Swetton v. Cashe*, *Yelv.* 36, 37. There expressly held, that it lies not against an under lessee for a lesser term, and that because there wants an immediate privity, and consequently it must be against us: the very form of declaring in the case, is in *Hern's Plead.* 161. and so adjudged, *West v. Trude*, *Cro. Car.* 187. *Jones* 224. and *Jeremy v. Lowgar*, *Cro. Eliz.* 461. Nor can I see any reason, why it should not lie against a tenant at will, for we are liable over in that case, which is the true reason the books go upon. (a)

On a declaration stating that the plaintiff demised premises to the defendant for seven years, evidence that the defendant was only tenant at will is a fatal variance, on the issue "non demisit modo et forma." 2 Roll Abr. 692. 3 Leon. 80. Hob. 53. Cro. Jac. 140. Cowp. 766. Dougl. 377. 730. 1 Term Rep. 447. 659.

But supposing the house excepted, and then the defendant but tenant at will; if this finding maintains our declaration? This I waved, because I was of opinion, that it was a material variance.

Mr. GOLD however argued, that if at will, the verdict is for the plaintiff, and the lease only an inducement, and not of the substance, and the *modo et forma* is not material in this case; and cited *Clare v. Pepis*, *Cro. Eliz.* 41. 1 *Leon.* 68. *Kaire v. Deucart*, *Owen* 91. *Co. Lit.* 281, 282. and *Hyden's case*, *Cro. Jac.* 328.

To which Mr. ROW *e contra* insisted, that *modo et forma* in this case were of the substance of the issue, and that this was another demise; and that tenancy at will, and for years, were quite different, and cited *Dyer* 260, and 2 *Rolls* 709.

And THE COURT was of this opinion, and that the cases in the 2 *Rolls Abr.* 707. pl. 44 & 58. were stronger than this, and *Hob.* 72. And in this case they ought to prove a demise for seven years: though it must be owned, that if a man enter by agreement, he becomes tenant at will; and *cestuy que trust* is such.

TREMAINE Serjeant argued on the other side on the point of exception, only as I did, viz. that as to repugnancy there was none, because it is general, "all the houses and structures," and then the

(a) By 12 Geo. 3. c. 73. s. 46. "no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompence be made by such person for

any damage suffered or occasioned thereby. But it is provided, that nothing in the act contained shall extend to defeat or make void any contract or agreement made between landlord and tenant." See 33 Geo. 2. c. 30. s. 23.

exception

exception of one is well enough. Then it is excepted * to the plaintiff and his executors "to be used by him," which intends the interest, and not barely the use: then these words "not to be let or set," import an interest; for if only the use were intended, then the words "not to be let" would be idle.

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Afterwards THE COURT gave their opinion severally.

EYRES *Justice*. That it is no demise of the *new house* for seven years: the *new house* is plainly excepted out of the demise, though there seems to be a qualification of the exception, and there may be a saving out of the same, *Owen* 20. This qualification only amounts to give a tenancy at will to the defendant. It is at the pleasure of the lessor, whether the lessee shall enjoy it for the term, or any part thereof: and therefore it is only declarative, how the lessor agreed to use that house. But no term passes to the defendant by it, and therefore the defendant must have judgment for him, though I think the plaintiff might have declared right.

GREGORY *Justice* was of the same opinion. I think the action lies; for the thing speaks itself; for the plaintiff had a longer term in it, and that is lost. *Jones* 224. But, I think, the exception good, and no ways repugnant to the deed. If the thing did not pass by the general words of the grant, the exception would be useless. And *Dyer* reports not the case so well as *Anderson* and *Benlowes*.

DOLBEN *ad idem*. I think it an exception, and therefore not a demise for seven years.

HOLT *Chief Justice*. I think this new house absolutely excepted out of the demise. The words are as full an exception as can be. The words afterwards are no manner of qualification of the words of the exception, but only declarative of what purposes it was for. An exception may be qualified, as it may be for part of the term; but if a lease or assignment be for years, with an exception of the new house for life, this exception is void. 1 *And.* 52. is our case in point, and good law, and there held a good exception, and qualified; in *Dyer* it was held a void exception, but for another reason, because repugnant. Now it is true, you cannot except that which was particularly and expressly granted, but then the grant is only in general; the case of *Miller v. Pratt*, *Dyer* 264. in the margin, I take to be good law.

Judgment for the defendant.

Cafe 193.

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* Mogadara against Holt.

Trinity Term, 3 Will. & Mary, Roll 197.

In an action by the indorsee against the drawer of a bill of exchange, if the declaration alledge the custom to be that the drawer is liable on non-payment by the acceptor, and it appears that the bill was not presented until after it was due, yet the plaintiff shall recover; for the drawer always remains liable, and the setting forth of the custom shall be rejected as surplusage.

S. C. Holt, 313.

S. C. 12 Mod.

15.

Ante, 129

1 Vent. 153.

1 Lev. 298.

Lut. 892.

Hard. 486.

5 Mod. 367.

1 Salk. 128.

Skin. 346.

Carth. 83. 510.

2 Ld. Ray. 992.

1542.

Stra. 214.

3 Burr. 1687.

4 Com. Dig.

244.

3 Bac. Abr. 614.

Cowp. 571.

Dougl. 55. 250.

Kyd on Bills,

116.

1 Term Rep.

167.

2 Term Rep.

713.

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DECLARATION in cafe, on a bill of exchange, and sets forth, that the city of *London* here, and the town of *Rotterdam* abroad in foreign parts, are, and time out of mind, have been ancient vills, and that *two usances* and *a half* in any bill of exchange directed by any merchant in *London*, to any in *Rotterdam*, was, and time out of mind used to be *two months* and *a half*, from the date of such bill. That there is a custom, that if any merchant in *London* draw his bill or bills on any merchant in *Rotterdam*, payable to any merchant, or order; and if the merchant there accept any such bill, and before acceptance, or after, the merchant to whose order the money is directed to be paid, doth indorse it to any other merchant; and that other merchant indorse it to some other, and the merchant to whom the bill is directed, accept it after such indorsement, and fail in payment to the merchant to whom indorsed at the time limited for payment, whereby the bill becomes protested, and notice given thereof to the drawer, that in such case the drawer becomes liable to pay the same with damage to the indorsee. That the defendant 9 Nov. 1688, drew two bills of exchange of the same date, and for the same sums on *Edward Williams*, payable to the order of *Hartopp* for three hundred pounds value of himself; that *Hartopp*, the same day, indorsed it to *Marques*; that *Marques* the same day, indorsed it to the plaintiff; that the plaintiff afterwards, viz. 8 February 1689, *stylo novo*, gave notice to *Williams*, and he then accepted it; that *Williams* failed to pay it; that by reason thereof afterwards, viz. the said 8 February, the bill was protested, of which protest the defendant had notice the 28th of April, 1689, and did not pay it, to his damage, &c. The defendant demurs generally.

I ARGUED for the defendant, that the declaration was ill, because they had declared upon a custom, which was, if the bill drawn at two usance and a half, and accepted, and not paid at the time, then the drawer was liable. Now the fact alledged was a bill so drawn, accepted, and protested after the day of payment was expired, and therefore not within their custom; that the protest should have been for non-acceptance within the time, and then the party ought to have the bill tendered to him within * the time; that here they had not any acceptance at all within their custom; that the custom was for an acceptance within the time, and failure of payment at the time, and there could be no failure of payment by that custom, but upon acceptance before; that here the custom was part of the case; that they had set it forth specially; that they had declared of all the facts, *secundum consuetudinem pred.* and that *virtute consuetud' pred.* the defendant became chargeable, and in consideration

tion thereof *assumpsit*; that though the custom of merchants should allow of a protest after the time, yet here they fail, because they have declared of a custom to which they apply all their facts, which does not quadrate; that if a man declare upon an act of parliament, and set it forth otherwise than it is, yet if his case, and the act he sets forth do not agree, it is ill. Now here the usances and half were expired in January, and the days of grace allowed in such cases were but three; and therefore the judgment ought to be for the defendant.

HOLT *Chief Justice* doubted, because he said the law of merchants made him who was the drawer liable, though the acceptance were after the day; and then doubted, if they were not bound to take notice thereof as part of the law of the land; the which I thought new and strange, because many judgments had been arrested after verdict for variances between the custom and fact alledged, but never doubted upon a demurrer but it was ill. And though in the case of *Carter v. Devenish*, (a) which he quoted to me, it had been adjudged that the custom need not be alledged, yet in a declaration it was always usual to set forth the custom; and when they had done it, it was part of their case. But afterwards they severally gave their opinions for the plaintiff.

EVRES *Justice* for the plaintiff. Though the plaintiff hath alledged a custom contrary to his fact, yet that is but surplusage; for it is no more than the law of merchants, and that is *jus gentium*, and we are to take notice of it, and cited 2 *Rolls Rep.* 113. *Palmer's Rep. Rex v. Cosack, Co. Lit.* 183. *Yelv.* 136. Now if there be no accident happening or intervening, by the parties breaking, or the like, the drawer is chargeable, though the presenting of the bill and protest were after the day; for by the law of merchants it need not be tendered within the time.

GREGORY and DOLBEN *Justices* of the same opinion, that the judges are bound to take notice of it, and he needed not to have alledged a custom.

* HOLT *Chief Justice*. The time is well enough by the law of merchants, and that is the same with our law; now by that the drawer is chargeable by the "value received;" (b) for though it were not paid, or the bill presented within the time, yet it ought still to be paid; but if he do not tender and protest at the day, and there be a break in the mean time, the party loses his money; otherwise if no particular damage. (c)

4 Com. Dig.
244.
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Judgment for the plaintiff.

(a) Antc, page 127.

(b) It seems now to be settled that the words "value received" are not necessary; for they only import that the bill was made upon a valuable consideration, which the law presumes. Fort. 282. 8 Mod. 267. Post. 497. 2 Ld. Ray. 1481, 1556. and

the case of *White v. Ledwick, Bayley* on bills, App. N. 3.

(c) See 1 Stra. 441. 515. 649. 2 Bl. Rep. 747. 1 Term Rep. 170. 714. and Kyd on Bills of Exchange, 27. 79. Richard v. Bollman, 1 Term Rep. 405. Rogers v. Stephens. 2 Term Rep. 713.

Case 194.

Phyler against Boson.

Michaelmas Term, 2 Will. & Mary, Roll 250.

Direction of writ of error to an inferior court.

S. C. Ante, 145.

A plaint entered in an inferior court after the abdication "in the court of our lord the now king, &c. is bad."

NOW a new writ of error was brought directed "*Ballivis civitat' nostre EXON. et eorum cuilibet, quia in record' et coram ballivis, &c.*" And so right returned.

The writ was to reverse a judgment in trover after a verdict in the sheriff's court in *Exeter*.

THE FIRST EXCEPTION taken by Mr. CARTHEW was, that the plaint is entered 15 December 1688, in *cur' dom. regis Jac. 2d.* And so all one as in *cur' pred'*, which is ill, because of the *abdication*.

To which I ANSWERED, that by the act of continuance of pleas and the term, &c. "All bills, plaints, judgments, and proceedings in courts of cities or towns corporate, or any other inferior courts, and all other executions thereupon had since eleventh of December, and before the thirteenth of February, shall be good and effectual in the law, as if the said late king had remained in the exercise of his regal power;" so by that it is well enough for the style of the court.

A continuance in an inferior court must state before whom the next court is to be held.

S. C. Ante, 145.

S. C. 3 Salk. 130.

5 Com. Dig.

"Pleader,"

(V. 3.)

SECONDLY, That there is a discontinuance. Because that the *dies datus's* are *ad prox. cur. tenend' tali die*, and do not say before whom the court is to be held; and for it cited *Rastal's* and *Coke's entries*.

To which I ANSWERED, it is true, it must be said before whom the court is held, but it need not be in the *dies datus*; it is well enough if it be in the *ad quam quidem predict' cur.* and so it is here, and so are the precedents in those books.

Discontinuance of process is helped by appearance.

1 Roll Abr. 4th 5. Cro. Jac. 284.

The THIRD that there is a discontinuance for want of an *ei conceditur* upon the imparlance prayed from the 9th to 15th of February, there being only a *petit licent' interloquendi*; and that *ad quam* the parties appear, but no *dies datus* or *conceditur*.

To which I ANSWERED, that that is helped by appearance afterwards, or at least by the verdict. By the case of *Swift v. Nott*, Sid. 173. discontinuance of process is helped by appearance; in *Marshall v. Anderson*, 2 Keble 34. want of *dies datus* is helped by the verdict; in *Rawlins v. Higgins*, 2 Keb. 715. held error in judgment for the defendant otherwise not; in *Green v. Cubet*, 2 Keb. 626. discontinuance * aided by verdict in inferior courts, and in *Mollineux's case*, Cro. Jac. 236; but an express authority

is *Cole v. Green*, 2 *Saund.* 257. by the judges in the house of lords, that the statutes of Jeofails do extend to inferior courts; that they are helped by 21 Jac. 1. c. 13.

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And of this opinion was ALL THE COURT, and the judgment was affirmed, for that the discontinuance of process is helped at common law by appearance, and a discontinuance of court is helped after verdict by the statute of Jeofails; and so they held in another case, this term, of *Walwin v. Smith*. See *Jeffson v. Laxon, Cro. Car.* 254. 1 *Rolls Abr.* 486. 779. (a)

Statute of Jeofails extend to inferior courts.
3 Lev. 374.
1 Com. Dig. 342.
Doug. 115.

(a) By 5 Geo. 1. c. 13. after verdict in any court of record in England or Wales, judgment shall not be stayed or reversed for any default of form or substance in any

bill, writ original or judicial, or variance from the declaration, or other proceedings.

Jefferyes against Legendra,

Case 195.

Hilary Term, 2 Will. & Mary, Roll 659.

DECLARATION in case, upon a policy of assurance on a ship called THE OLIVE BRANCH, from London to Naples; and sets forth the policy *in hac verba*, by which the ship was warranted to depart with convoy; and avers, that being laden, she departed from London towards Naples cum et sub præfatio navis guerrinæ. That afterwards she was taken at sea, and lost. *Non assumpsit* pleaded.

In a policy of assurance on a ship from "London to Naples," warranted to depart with "convoy," the words "depart with convoy" mean that she shall sail with convoy for the whole voyage; but if the ship departs with convoy for the voyage from London, and is separated by stress of weather and lost during such separation, while in search of the convoy, without any default in the master, the underwriters are liable.

THE JURY find, that the defendant signed the policy *prout*; that the ship departed with convoy; that the ship was separated from the convoy by stress of weather in the Downs; that she was driven into Foy; that she (waiting for convoy) did afterwards go out expecting to meet the convoy, supposed to be coming from Torbay; that the wind was fair, that the convoy was not come up; that she could not return; that she failed on; and that afterwards, ten leagues off, she was taken by a French man of war.

TREMAINE *Serjeant* for the plaintiff. That here the adventure is to begin at the loading of the goods, which is before the departure; that these are mutual agreements; that they ought to bring their action according to the opinion of the case of *Hind v. Knightley*, upon the policy, where the ship was warranted to be in the Downs; that here the warranty was performed, *i. e.* a departure from London; that what the master hath done, is consistent with his duty, and it is found he used his utmost endeavour; and that there was no default in him: that supposing it a condition precedent, yet it is expressly found, that she departed with convoy; that the first

S. C. 3 Lev. 320.
S. C. 4 Mod. 58
S. C. Saik. 443.
S. C. Holt, 465.
S. C. Carth. 216.
8 Mod. 66. 250.

2 Roll Abr. 248. Skin. 3. 2 Vern. 176. Stra. 1250. 1265. Ld. Ray. 732. 840.
30 Mod. 77. 287. 3 Bac. Abi. 600. 1 Burr. 347. 3 Burr. 1237. Cowp. 601.

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separation was by the perils of the sea; and that the convoy is the king's ship, (a) and not at the plaintiff's command.

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E CONTRA. In the arguments in this case I made a *quere*. FIRST, What is the meaning of these words, "*depart with * convoy*," whether going out with convoy, or going the voyage with convoy? SECONDLY, Whether that be a conditional part of the agreement, so as that the insurance obliges not, unless it be performed, or if they are mutual *assumpsits*? THIRDLY, Whether, supposing it a condition, or part of the agreement, it be here found to be here performed?

Skin. 54-
1 Vesey, 317.
Park on Ma-
rine Insurance
ch. 1.
Park 338.

As to THE FIRST. This policy is but a parol contract, and that between merchants and traders, and in such cases the words are to have a reasonable intendment: it is to be construed according to the mind of the parties expressed by these words, and those words are to be interpreted according to the nature of the thing and the subject matter about which such words are used. Now the subject matter here, is a voyage from *London* to *Naples*, the undertaking is an insurance, or promise, to answer, or satisfy for such losses as shall happen in this voyage; these additional words "*warranted to depart with convoy*," if of any use, are to lessen and diminish the adventure which the insurer undertakes. Now this is a restrictive clause, and qualifies the force of the general words which are in the body of the policy, *viz.* "*all perils*:" and if any other construction be had for it, it must be immaterial: and it is a rule in all constructions of devises, awards, contracts, or agreements, that every word is to have a meaning, if possible, and such sense is to be made thereof, that every clause shall have its due force, and that according to the intention of the parties: I need cite no authorities for these plain rules. Now if the strict literal sense of the word "*depart*," be taken in this case, then that clause is useless; for to depart from *London*, there is no need of convoy; for in our own harbours (*gratias deo*) we are safe enough; and to depart in the strict sense, is to break anchor, set sail, and leave the port of *London*: nay take it in the most strict sense, and construe it without any latitude, and it is only to leave THE CITY of *London*; for *London* only signifies the city, unless you intend it according to the subject matter, and then THE PORT is meant, which reaches no further than the *Hope*, or thereabouts. It must therefore be meant, "*go with convoy*," as "*depart in peace*," signifies "*peace attend you*." *Decedere* must have *terminus a quo*, and *terminus ad quem* both, especially in this case, for otherwise it would be "*to depart*" indefi-

(a) By "*convoy*" is meant certain ships of force appointed by government in time of war to sail with merchantmen from their port of discharge to the place of their destination. Postlethwait's Dictionary, title "*Convoy*." Park's Law of Marine Insurance, 338; for it is not every single ship of war which chooses to take a

merchant ship under its protection that will constitute such a convoy as a warranty means, but it must be a naval force under the command of a person appointed by the government of the country to which they belong. Hibbert v. Pigou, Easter Term, 23 Geo. 3. Park on Ins. 339 and 343. note (a)

nitely,

nately, and then departure upon another voyage with convoy, would fulfil the words; which was never intended: now there must be an intendment for the port of *Lisbon* & *gas*, why not for the *locus ad quem* the voyage is designed? And there is all the reason in the world, from the nature of the thing, for the * time intendment in both. Reason says, it must be in a voyage, and in this voyage, and this voyage is from *Lisbon* to *Naples*, *ergo* the same reason holds for the one as well as for the other. The method in the civil law, for discerning the true sense of agreements, is by interrogation: now here, suppose it queried, what if the ship go alone? no, it shall depart with convoy. What if the convoy leave her at the river's mouth? The answer would be, without peradventure, "she is " to have, and go with convoy." All contracts are to be construed by our law according to the intent of the parties, as near as the rules of law will admit. Now in our case there is no rule of law, nor particular reason against this construction which I am now contending for. MY LORD, there are infinite numbers of cases that words are to be construed according to the nature of the thing, and the subject matter, and upon that account even different from their literal (or otherwise natural) sense: as "and" for "or," and "or" for "and," according to the subject matter, *Pirard* 289. a conjunction for a disjunction, *et e contra*, *Owen* 52, 53. Nay, contrary to the very words, if the intent be pregnant and strongly manifest, as, the condition of this obligation to be void. *Maisner v. Hawxby*, *Sid.* 456. 2 *Saund.* 78. 1 *Mod.* 35. Words are oftentimes rejected, if contrary to the apparent sense of the parties: the intent is to be performed, and not the words. See the case of *Barry v. Smith*, *Dyer* 219. In the case of *Pickering v. Berkley*, Easter Term, 24 Car. 1. Roll 154. it is in 2 *Rolls Abr.* 248. and *Styles* 132; covenant on a charter-party, that the defendant in consideration of a sum agreed on for freight, should make such a voyage, and bear all loss and damage which should befall the ship or her lading, except only perils of the sea; the defendant pleads that, in making that voyage, the ship was taken by a man of war unknown, whereby he was hindered in making his voyage; on demurrer to it, the question was, if the capture by unknown men of war, be a peril of the sea, or not, according to the meaning of merchants? and it was argued strongly that it was not; but, upon a certificate of merchants read in court that it was so esteemed, the court inclined thereto, yet desired *Crawly*, the master of the Trinity-house, and other sufficient merchants to be brought into court to satisfy them *viva voce*, and it was so done accordingly, and judgment for the defendant. I * urge this to shew, that the meaning of words, according to their use amongst merchants, may be even contrary to their natural sense; for in strictness, "perils of the sea" import only "tempests, and dangers by rocks, winds, or waves." The judges have been governed by grammarians about the meaning of words amongst them, as *modo*, &c. Now there is the form of expression used in policies to distinguish when a ship is to go with convoy, and they have no other different way of expressing it, and therefore cannot be taken to be for a particular agreement, only

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to have a precise departure with convoy, which might be more colourable, if they had diverse forms in this case. Besides, this clause is added in short at the end of the policy; which shews, that the paucity and scantiness of the words was only for brevity, and not upon any restriction or particularity in their agreement, that it should mean no more: and therefore I conclude this: *quære*, that "depart" here, must mean going *the voyage* with convoy.

SECONDLY, we are not enforced to another action, as in mutual covenants or *assumpsits*.—FIRST, I observe, that the law abhors circuitry of action, if by any means or construction it can be prevented. I need not quote cases to prove it. *Kelway* 34. 7 Co. 38. *Plowd.* 34. The law will never put a man round, unless on an absolute necessity; this is all a parol agreement; and in the case of *Hind v. Knightly*, though so ruled at first, yet the then and after opinion of all, save one or two judges, was with me; for there, though there was a recovery, notwithstanding the breach of the warranty for the ships being in *the Downs*, yet I well remember, that all the opinions were against that; and MR. JUSTICE JONES declared himself so afterwards upon the trial of the insurer's action for deceit in that warranty, for that it made all but one contract, and a parol averment might be against it. This is part of the agreement; it is *the mode* of the voyage, upon which we insure; it is as it were a *condition precedent*; and in a personal contract there needs no precise words to make a condition, as "*si, proviso,*" "*sub conditione,*" or the like. "*Ea intentione,*" or "*ad suppositum*" will in many cases make a condition in a will; slight words do it there, and the same reason holds in contracts and agreements. We are not here arguing for a condition to vest or divest, create or destroy, an estate of freehold or inheritance; any words that amount to a signification of the parties sense, that a particular thing is to be done, or otherwise the rest is to fail, if it appear that such is their intent, is sufficient; and then if that be not observed, the other fails; and it must be so intended; and were * it intended otherwise, it would have been added (as *Grotius* in his right of war and peace, *lib. 3. cap. 19. sect. 14.* says, is usually done in such cases) that if either party do transgress in this, or that particular, yet the rest shall remain firm and immoveable. Here this is a part of their policy, and so is it in their count, *tenor cujus sequitur*, and yet that we were content to become insurers, *secundum tenorem ejusdem scripti*. Besides, consider the nature of the policy; it is a negotiation amongst merchants; and there says *Straacha de Mercator.* 804. the intent is chiefly to be regarded; and if it be not so, yet it is *falsa demonstratio quæ vitiat asseverationem*, as if the party have no goods on board, or if that there be no such ship, or no such voyage had; for then say those decisions, there is no hazard run, and consequently the *præmium* to be returned, Policies are to have a reasonable intendment: so if the ship or goods were lost before the policy was made, and the party insured had notice; though the words "lost, or not lost," be inserted, yet the policy is void, If general without these words; yet if lost before policy made,

A policy of assurance is a contract of indemnity, in the construction of which the intention of the parties is chiefly to be regarded.

1 Burr. 347.

4 Com. Dig.

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made, it is void, because of the improbability supposed that any man would engage against that which is already happened, *Straacha* 143. 222. (b) I urge this to shew, that such reasonable intendment is to be made here, that this was part of the agreement, for that in time of war (of which you will take notice) men would not readily insure ships going without convoy. Besides there is another rule, that in construction of the nature and extent of the insurance, a regard is to be had to the quantity of the *premium*, and that helps in many cases. It is to be intended of the first voyage, *Straacha* 173. of one voyage only. So to refit a ship, it is only *pro prima vice*, *Straacha* 806. Then there is another rule that holds inviolably, that the change of the voyage doth dissolve the contract, *Straacha* 154. which brings me to

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THE THIRD AND LAST QUESTION. Whether the insurance made of this voyage were so observed, that we are bound by our policy? Now, MY LORD, upon what I have already offered, it appears that an insurance is a conditional contract; now if such condition by any collateral impediment, be prevented from ever happening in the manner it is agreed upon, neither party are bound; and if it happen by the default of the insured, we are discharged, and yet the *premium* is ours: but if by neither of their faults, then neither are bound, and so is my aforesaid author 804. We * undertook only to pay the loss, in case the ship, going in such a manner, be lost; and it matters not to me whether the hazard be prevented by their default or not, if by their default, they lose the *premium*; but if otherwise, it however vacates the contract. That matter happening afterwards, though not by the default of the insured, may vacate an insurance is plain. I mean such as prevents or alters the mode of the voyage; as suppose by the default of the master, who is here a third person, a mere stranger to this contract: if an insurance be upon goods in a certain ship by name, and afterwards they are put on board another ship, it is plain the insurers are not liable; (c) nay, the civilians go further; though there were a clause of power to transmit from one ship to another, yet if the goods are taken on shore and lodged there, and afterwards put on board another ship, the insurers are not liable, *Straacha* 836. We are not within the law or rules of impossibilities happening by the act of God to save from penalties; ours is no more than the common case of a conditional *assumpsit*, an executory promise upon an act done, and to be done to, or by a stranger; and in such case it is not enough

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(b) In the case of *Blackhurst v. Cockell*, Trinity Term. 29 Geo. 3. goods were insured from the lading of them on board the ship, "lost or not lost," and warranted well on a particular day, and the ship was lost on that day before the policy was underwritten; and it was holden that the underwriter was liable; for the warranty was complied with by the ship being safe any time of that day, 3 Term Rep. 360; and in general, these words, which are pe-

culiar to English policies, 5 Burr. 2803. are taken to increase the risk, and therefore, unless there be fraud the underwriter is liable, whether the loss happen before or after underwriting the policy, Park. on Inf. 25.

(c) *Dick v. Barrel*, Stra. 1248. *Plantaman v. Staples*, 1 Term Rep. 611. notes. *Pelly v. The Royal Assurance*, 1 Burr. 341. Park on Inf. 290.

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to say, that it was endeavoured, or that the circumstance was rendered impossible to be observed by the act of God; for if it be so, I am however discharged from my promise, see 7 Co. 38. *Styles* 280. *Cro Eliz.* 833. 1 *Rolls Abr.* 450. The full intent is to be performed, and not the bare words: then here the intent was, that the voyage should be had with a convoy, or at least till past danger; now here is no such matter found, nay the contrary is found; the loss is not by storms, or tempests, by rocks, winds, or waves, but for the want of convoy; it is found the convoy was ninety leagues behind, and the master knew it. His going out *ea intentione* to meet her, will not help it; the plaintiff was to proceed and keep with the convoy; the agreement for it is on his part; he was not bound to go with this or that particular man of war, but with convoy in general; he ought to have waited for that or another: besides, it is of no regard to us, whether he were blame-worthy or not. Suppose his designed convoy had left him at the river's mouth, and refused to go with him, and a loss happens for want of him, we are not bound to answer the loss, for we never undertook to assure under such circumstances, or upon such terms. Here the plaintiff undertook for the act of a stranger, and this stranger doth not that act; it is not found he ever came out of *Torbay*. Upon the whole I pray judgment for the defendant; for that "to depart without convoy," must be construed according to the subject matter, * i. e. to go the voyage; then this being part of the agreement, and not observed, though without the plaintiff's default, we are discharged of our promise, which was to be an insurer *secundum tenorem scripti præd.* and that was in a voyage with convoy.

Afterwards SERJEANT THOMPSON argued for the plaintiff, and SERJEANT LEVINS for the defendant.

LEVINS *Serjeant* argued on another topic, and agreed what I laboured to deny, that if the master had done his utmost, then the cause was against him; but laboured to shew a default in the convoy and master in not meeting after the separation, which was sufficiently difficult, as the fact was found: that he might have sent to *Torbay* to have enquired for the convoy; that the convoy might have come up, but was negligent and staid behind when the wind was fair; that the convoy being to be provided by them, if any default in him, it was against the plaintiff.

HOLT *Chief Justice* denied the case of *Hind v. Knightley* to be law, and that the current opinion was against it. That it was part of the agreement, and if not fulfilled did vitiate the policy. But he said that "*decessit*" only signifies a departure from *London* in that voyage: and suppose he does depart, and is at sea, the voyage is begun: if the separation had been by *fraud* it were somewhat; but here the separation is by stress of weather. Suppose the master had committed barrettry, the insurers are liable: if you intend he should go the voyage with convoy, you must make the agreement so.

GREGORY

GREGORY *Justice*. There is no manner of fault in the plaintiff: when the vessel was once gone to sea with convoy it was not in the plaintiff's power to do more.

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EYRES *Justice*. I take it, the meaning is, that he should go out with convoy, and so continue with him to the end of the voyage, without any default in him; and the special verdict hath found no default in him. Judgment for the plaintiff.

-DOLBIN *absente sic consentiente*. (d)

(d) HOLT *Chief Justice* and the greater part of the court held that the general words "depart with convoy" shall be construed "depart with convoy for the voyage." S. C. 3 Lev. 321. and in the case of Lilly v. Ewer, Dougl. 72. this construction of the words was confirmed by the unanimous opinion of the court of King's Bench, Park on Inf. 345. but the point which the court decided in the principal case was "that this separation being by a tempest at the first, and the ship and convoy never after meeting, and the ship failing to meet with the convoy to go with it the rest of the voyage, and being again

"driven away by tempest, and taken by pirates, though the convoy remained all this time at Torbay, yet this was not such a neglect in the captain as to discharge the insurer." S. C. 3 Lev. 321. S. C. Carth. 216. and this decision has never been departed from in any instance, Dougl. 73. Park. on Inf. 347. but the principles of it have been in several instances confirmed, Victoria v. Clene, 2 Stra. 1250. Taylor v. Woodness, Park on Inf. 349. Eden v. Parkinson, Dougl. 732. Delaney v. Stoddart, 1 Term Rep. 22. Tyfar v. Gurney, 3 Term Rep. 477.

• The King against Warrington.

Case 196.

INFORMATION here in the King's Bench against Warrington and others for a riot committed in Chester.

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On issue joined upon not guilty thereon, by writ of mittimus the tenor of the record is sent *camerario nostro com' palatin' in Cestr. pro ejus locum ibid. tenent. COMMANDING quod inspecto tenore præd. per breve nostrum sub sigillo com' palatin' præd. debit' consciend' mandari fac' recordum præd. majori civitat' Cestr. præd. dand. in mandat' eidem majori quod quoad triand' exitum in recordo præd. junctum idem major mandari faciat ROBERTO KENTISH un' mercat. civitat' præd. quod venire fac. coram majore præd. ad certos diem et locum per ipsum majorem limitand' postquam record. præd. sibi liberatum fuit duodecim liberos et legales hom' de visn' civit' Cestr. præd. quorum quilibet habeat quatuor libras terræ tenementor' vel redditus per ann. ad minus per quos rei veritas melius sciri poterit. Et qui præd. W. &c. nulla affinitate attingunt ad recognit'—si &c. Et ulterius taliter process' versus jur' inter nos et præd. impanell' fac. qualis secund' legem et consuetud. civitat' præd. in hujusmodi casu fieri consuet' fuerit quousq; exitus præd. plenarie trietur: et cum præd. exitus et verificatio ibid. fact' et triat' fuerit quod tunc præd. major record' præd. cum toto eo quod inde in cur. nostra ibid. fact' vobis mittat ita quod ea*

If a sheriff, where the shrievalty consists of two persons, be a defendant in a cause while it is their duty to return the jury, a suggestion may be entered on THE ROLL that the defendant is one of the sheriffs, and the venire facias shall be directed to his companion.

S. C. 4 Mod. 65.
S. C. Salk. 152.
S. C. Carth. 214.
S. C. Comb. 191.
S. C. 12 Mod. 22.
S. C. Holt, 166.
2 Roll Abr. 667. 669.

Dyer 367. Co. Lit. 157. 9 Edw. 4. pl. 6. Moor 356. Stra. 235. Cowp. 112.

omnia

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omnia vos nobis in cur. nostra coram nobis apud Westm. remittatis ad certum diem per nos præd. partibus præfigend' ad audiend' inde judicium, et habeatis ibi tunc hoc breve, &c.

RESPONS' prenobilis WILLIELMI comitis DERBYE camerarij com' palatin, Cestr. infra script' virtute istius brevis mihi direct' dedi in mandat' per aliud breve direct. majori civitat' Cestr. infra script' prout. interius mihi præcipitur, qui quidam major, viz. N. W. arm. dedit mihi in respons' quod executio illius brevis patet indors' in record' huic brevi annexat' et supra hoc prefix' partibus infra script' tres Michael' prox' futur' ad essend' coram dom. rege et domina regin' ad audiend' inde judic' suum, &c.—Indorsed the record thus.

PLACIT. coram domino rege et domina regin' apud. WESTMINSTER de termino sanctæ Trin. anno regni dom. WILL. et dom. Maræ nunc regis et reginæ Angl', &c. tertio.

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* Inter Placit' Regis et Reginæ Rot.

Civitat' Cestr. et comitat' ejusdem civitat' ss. MEMORANDUM quod SAMUEL ASTRY, &c. The defendants appear; and plead *non cul'*. MR. SAUND. says, that the issue above joined is *per homines com' civitat' Cestr. præd. ubi breve domini regis et reg' non currit et non alibi triari debet ac homines de eod' comit. civitat. illius extra eund' com. civitat. illius ad aliquam jurat faciend' venire non debent nec solent*; and that the said WARRINGTON and one ROBERT KENTISH are sheriffs com' præd. civitat' Cestr. ac pro eo quod idem JOHANNES WARRINGTON unus vicecom. com' ejusdem civitat'; he prays process de venire fac. ad triand' exit' præd. superius junct. præd. ROBERTO K. alteri vicecom' civit' præd. tant' derigend' &c. and because the said defendants deny it not; ideo mandetur camerar. &c. Et postea scil' ad cur. &c. the issue is tried by a jury returned by the other sheriff, and the jury find them guilty.

MR. CHESHIRE moved here in arrest of judgment, that the venire is mis-awarded, for it ought to have been directed to the coroners; for that both the sheriffs are but one officer, and the resolution in the case of Auditor Curle, 11 Co. is express, that the one can do no act of himself; if one die, the other cannot act. Suppose one dies, the award must be to the coroner: suppose execution against one of them, shall the other sheriff have the custody of him? That would be a commitment to himself, 2 Hen. 4. pl. 4. Suppose conuzance of pleas granted to be held before two bailiffs, and an action is against one of them, there the court shall be ousted of conuzance, for that one only cannot hold plea., 1 Rolls Abr. 492. Cro. Car. 138. Goff v. Carne, Styles 342. Award to the coroners in such case held well, 36 Hen. 6. 1. They are but one officer, though three persons; and if one doth not take the oath, the others are not qualified. Upon 1 Edw. 6. c. 10. if they were several officers, they must have several deputies, whereas the coroners are several officers, and each comes in upon a distinct election.

I URGED

I URGED *à contra*, that the *venire facias* was well awarded; for though they are but one officer to most purposes, yet in case one be challenged off, the other may execute. So is it in the case of coroners, 31 Aff. pl. 20. A *venire* may be awarded to one coroner upon a challenge of the other, *ita quod* the other do not intermeddle, &c. And * this is for necessity in case of a challenge, because the reason of the challenge goes but to one. The law requires hundredors, yet there need none, where either party is lord of the hundred; it may be out of the next adjacent hundred. This was resolved Hilary Term 34 and 35 Car. 2, and upon debate, in the Easter Term following in the case of *Sir Peter Rich v. Sir Thomas Player*; and the *venire* was awarded as here, and a challenge to the array for this cause, and that challenge saved by the allowance of a bill of exceptions, and afterwards moved in arrest of judgment by SIR WILLIAM WILLIAMS, that they were but one officer as it is now objected; and judgment for the plaintiff. I remember there were cited for precedents, in *Norwich*, Hilary Term, 8 Hen. 8. in the King's Bench, Roll 303. and in *London*, Trinity Term, 18 Eliz. in *Banco* Roll 511. The case of sheriff *Betbel v. Harvey* here in this court when he was sheriff, was the same. In *Brownlow's Declarations*, the second edition, printed 1653. fol. 44. is an action brought by a coroner, and a challenge, because of his relation to the sheriff, and then he suggests that he is one of the coroners, and prays a writ to the other, and has it; in the same book, fol. 45. is another of the same. This very writ, in case of a sheriff, is in *Brownlow's Brevia judicilia*, 396. in *London* the very same suggestion as here, and awarded accordingly *alteri vicecom'*. As to the case in *Styles*, it is no authority, for it is a nonsensical case as put there, and no authority: it is true, if there be no sheriff, that makes the award necessary to the coroner; now if one be dead, then there is none; but otherwise where there is a challenge.

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HOLT Chief Justice. If the archbishop of Canterbury be plaintiff in a *quare impedit*, the writ must be awarded to the other archbishop.—And afterwards he delivered the opinion of THE WHOLE COURT; that the *venire facias* is well directed; that the precedents are in *Brownlow* as they were cited; that this was settled in the case of *Rich v. Player*. The objection is, that they are but one officer, and have the sheriffalty jointly in them; but it is otherwise in case of a challenge. The coroner is only to execute the writ, when there is no proper officer; for if no such officer at all, as if the sheriff die, the coroner cannot execute it, 22 Hen. 6. pl. 51. Then it is the challenge to the sheriff as improper, that makes the coroner a proper officer; and then why cannot the challenge to one sheriff, make the other a proper officer? Suppose one coroner be challenged, the other may execute it, that is plain. Now where is the difference? For all the coroners are but such one officer as the two sheriffs are. It is true, if there be two sheriffs, their authority is joint; but the act of one is the act of both, *Mod. Rep.* 198. Suppose a *quare impedit* be brought against the * archbishop

F. N. B. 38.
1 Brownl. 189.
Dyer 350.

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of York as a disturber, the writ shall be directed to the *archbishop* of Canterbury, and yet he hath no superiority, *Dyer* 328.

Judgment was given for the king.

Case 197. Carivil, Executrix of Dodsworth, *against* Edwards.

Trinity Term, 3 Will. & Mary, Roll 394.

To debt on bond by an executor, the defendant cannot plead *in bar*, that the testator and other creditors of the defendant entered into a letter of licence with him, in which they covenanted and agreed not to sue him within such a time on pain of forfeiture; for it does not amount to a release of their debts.

S. C. Carth. 210.
S. C. Holt, 546.
Ante, 47.
Post, 350.
Co. Lit. 264.
9 Co. 52.
Cro. Eliz. 352.
1 Roll Abr. 939.
Carth. 64.
Cowp. 47.
H. Bl. Rep.
149.

DE B T, upon judgment on an obligation made to the testator, and sets forth the bond and recovery by the testator in his life-time.—The defendant pleads, that the plaintiff ought not to have her action, because he saith, that the testator, in his life-time, after the making the obligation, and recovering the judgment aforesaid, viz. 6 February, 1681, at the parish aforesaid, in the county aforesaid, by certain articles of agreement, indented, made, granted, and agreed between the said defendant *per nomen*, &c. and the said testator in his life-time and J. B. and H. K. principal creditors of the said defendant on the behalf of themselves, and the several creditors of the said defendant, in a schedule, to the said articles annexed, named, by, and with their consent, testified by the subscription of their names, and setting to their seals, and delivering the same as their act and deed, &c. the which articles *sigillo testatoris hic in cur' profert*, reciting the defendant indebted, and not able to pay them without their compliance, in accepting such satisfaction as he could give; being an equity of redemption in certain houses, &c.; "IT WAS COVENANTED, concluded, and agreed by and between the said defendant, for himself, his executors and administrators, to, and with the said testator, and the said J. B. and H. K. jointly and severally, and with their several executors, administrators and assigns, by the said articles, as in the same is mentioned, *Imprimis*, the defendant licenses and authorizes the said testator and J. B. and H. K. to dispose and sell the right aforesaid, &c. and that upon the sale thereof, he to seal deeds as they should advise; and after the mortgage money and interest paid, and the expences about such sale, &c. the residue of the proceed thereof to go to satisfy the several creditors, as the same could suffice proportionably; and that every creditor upon receipt of his proportion, as aforesaid, should make, seal and deliver to the defendant a general release. And further agreed by, and between the parties to the said articles, *quod interim et quousque premissa vendit' forent ut pred. est et extunc postea pred.* WILLIELMUS EDWARDS (the defendant) *non seclat' vel prosecut' foret ad legem vel person' sive bon' per aliquos dictor' creditor' antea in* "eisdem articulis mentionat' vel aliquem residuor' subscribent' adinde pro aliqua re præterita sub penalitate reliction' et exoneration' d. biti vel debitor' tal' personæ sive personar' creditor' sive creditor' qual' sic seclaret et prosequeretur seclarent et prosequerentur" ut predict' est prout per articulos pred. plenius liquet et apparet: and so the defendant saith, that the plaintiff by prosecuting and exhibiting his bill aforesaid against

against him the defendant aforesaid, and upon the obligation and judgment aforesaid hath forfeited to the said defendant the said debt, according to the true intention of the articles aforesaid, *et hoc paratus est verificari unde petit jud.* Upon this there is a demurrer joined.

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I ARGUED for the plaintiff, that the plea in bar was ill. This is only a covenant, and not a release; he may bring his action on the covenant, and recover the value of the debt. Here are no words of release as are mentioned in *Co. Lit.* 264. It is only said, he would not sue under pain of forfeiting his debt, *i. e.* the sum: this is not as it was in the case of *Macbeth v. Cobb*, *Mich.* 1 *Jac.* 2. that the debtor should be acquitted; and as some letters of licence are penned, that the same should be taken and accepted as a release. I will not controvert, but that a release may be upon condition; but this is not such. A deed may be defeasanced, and so may a judgment; but this sounds merely in covenant; for there it is agreed, that express releases should be given when they receive their money out of the sale of the equity of redemption. This is not like the case of *Hickmott*, 9 *Co.* 52. where by indenture he acknowledges himself fully satisfied and discharged of all bonds, except one such; and replied, that the bond in suit was excepted; and held a release of these not excepted, because acknowledgment of satisfaction: here is no such declaration; only a covenant not to sue. There is the case of *Butler v. Monnings*, *Noy* 5. per ANDERSON Chief Justice. A. seised of three acres grants a rent-charge out of them to B. and then enfeoffs C; B. covenants and grants to and with C. that he would not charge the said two acres granted to C. with any distresses for the said rent afterwards; and the question was, if it were a release; and by ANDERSON, held that it was not, though GLANVILLE thought it one.

SECONDLY. This action is brought by my client who is executor, and therefore this suit is no breach of the condition; for that is by the parties subscribing to the articles; now we are none of those; a suit by us is no suit by our testator; and so it is expressly resolved in the case of the prior of *St. John of Jerusalem*, 27 *Hen.* 8. *pl.* 16; where it is agreed by FITZHERBERT, and denied * by none; that if I am obliged to you that I will not sue J. S. my executor may sue J. S. and it shall not be any forfeiture of the obligation; for this condition is a collateral thing, and shall be construed according to the words, which extend to the person only, and not to the heir or executor. It is true, the executor represents the person of the testator as to obligations and liens, but not in conditions. In collateral clauses, the executor is bound, and shall answer a breach of this covenant, because included in the covenant, though he were not named; but since the covenant is, that A. shall not do such an act, A.'s executor is not included in the name or person of A. because that is collateral. Suppose A. be bound, that he will not go to *York* in seven years, no man will say that the executors going thither within the seven years, is a breach, though the executors were bound if the

A condition not to sue a debtor within such a time under such a penalty, does not extend to the executors of the obligor, unless they are named in the deed.

9 *Co.* 92.
Noy 5.
Dyer 65.
Cro. Eliz. 398.
1 *Roll Rep.* 68.
Hob. 188.
1 *Willf.* 4.
1 *Esp. Dig.* 357.

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testator went, *Wentworth* 145. Besides, it is the party's subscribing; now we never subscribed; and that explains their intent and meaning to be clear, that the parties themselves were only intended, and not their representatives; as in *Sir Francis Englefield's case* is agreed. If a man make a settlement with a power of revocation by writing under his hand, and the party being beyond sea, refuse to return, whereupon his lands are to be seised, the king cannot make a revocation, because the act is restrained to his person, to a writing under his own hand, though it is adjudged that the king comes in his place and stead, and may make a tender of a gold ring, or piece of money, or the like; but the former is held to be merely and strictly personal. In that very *case of the prior's*, the fact was thus; a lease was made, with a "PROVISO, that if the said prior, or any of his brethren commanders, would inhabit upon the same, and keep it for their own use, then upon notice the lessee and his assigns to remove:" the lessor dies, and the successor gives notice to remove, and then enters: there were divers questions in the case; as if it were a condition, &c. but one great question was, if the successor were included; and held by all, that he was not; for a successor may take, or be bound by the act of his predecessor. And yet in conditions collateral a successor is not included, unless named, 27 *Hen. 8. pl. 28*. An executor in truth represents the person of the testator; but that is chiefly as to beneficial, not to penal points; for in the latter they are different persons, and in suits it is so reckoned, though in things for their benefit. *Noy, Bro. tit. Stat. Merch. 43*. If the consutor in a statute be returned "dead" by the sheriff upon an extent, a *scire facias* must go against the executors, &c. So on a judgment *scire facias* is necessary on death of either party to have execution. The reason is, because they are esteemed different persons in our law. The reason of abating suits by death proves this sufficiently. Pray, MY LORD, consider the reason why an executor shall not pay costs by force of 23 *Hen. 8. c. 15*. which gives costs to a defendant against a plaintiff suing for a wrong or breach of promise, or the like done to the plaintiff, against whom it passes by verdict or non-suit; the law is ruled to be, that an executor suing upon such wrong or breach of contract made to his testator shall not pay costs, because he is another person than the testator, to whom the wrong or injury is supposed done, and therefore not done to the plaintiff within the words of that statute; and if this be not the reason, I know of no reason at all for it. It is no answer in our case to say that THE CHANCERY will compel an execution of, and compliance with these articles, for their rules rather prove the common law, viz. by contraries. This is to be taken strictly, because it is *quasi* a condition, and because it is to defeat a just debt without payment or satisfaction. Suppose a condition were annexed to a term for years, that the lessee by name do not alien, and the lessee dies, and his executor aliens; this is held no breach, *Dyer 65. pl. 8. 3 Edw. 6*; and this is agreed for law, 1 *Rolls Rep. 68*. Now this is, because the intent ought to be only to restrain the person of the lessee. Condition not to alien, but to one of his brothers; he aliens

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to one of them who aliens to another; held no breach, *Whitchcott v. Fox, Cro. Jac.* 398. *Dyer* 152; and as the case is, 1 *Rolls Rep.* 68. held, that covenants or conditions that are penal, shall not extend further than the person named. So it is likely to have been the meaning of the parties here, and the true design of these articles might be to reach only to their own acts. My client's testator might be willing to oblige himself not to sue under pain of forfeiting his debt, because he needed it not, as having an annuity or pension, or office, or profession, or trade, for his life; but he would not oblige himself, that his executors should not sue; for his children or next of kin might have more need, and so not be in a condition to be so charitable. So that perhaps if the clause had in words extended to executors, he and many more would not have signed the articles; and therefore the words being only to personal acts, and the thing admitting of such an intent, I conceive our suit no breach of the agreement. And therefore pray judgment for the plaintiff,

MR. * HALL *e contra* argued, that this is a sufficient release; and cited for it 21 *Hen. 7. pl.* 23. & 30. 2 *Bulstr.* 95. 290. *Bridgman* 117. 1 *And.* 307. 3 *Cro.* 352. *Co. Lit.* 204. 236. 43 *Edw.* 3. *Fitz. "Damages,"* 37. 2 *Saund.* 148. But he said nothing to the other point; being unprovided.

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HOLT Chief Justice. This is no release, but a *defeasance*, and such a one there may be by another deed, *Moore* 811. And the question is, if here be an acknowledgment of satisfaction.

Adjournatur. (a)

(a) In S. C. Carth. 210. Holt, 547. it is said that the whole court were of opinion it is a *defeasance* and no release, and that, it being a good *defeasance*, is

pleadable in bar. But see *Hornly v. Houlditch*, 1 Term Rep. 93. and *Heathcote v. Crutkhanke*, 2 Term Rep. 24.

Case 198.

Wynne against Fellowes.

The master of a ship covenants, that the ship shall be well furnished with men, and the freighters covenant the ship shall return in twelve months. In covenant for the ship's not returning in due time, it is a good plea that the ship was not sufficiently provided with men, &c.

S. C. Holt, 456.

D E B T upon a charter party, by the plaintiff as executor of *Wynne* the master, in which the defendant and other freighters covenant, that the ship should go and return home within twelve months, *periculis marium exceptis*, and the master warrants, that the ship at her departure, should be strong, well, and sufficiently furnished with a boat and necessaries, and manned with himself and eight men and a boy, which, or as many as should be necessary, should at all times convenient, be ready to serve with the boat during the voyage: and the plaintiff and the defendant, each bind themselves in a thousand pounds to the other for performance.—The plaintiff assigns for breach, that the ship departed from *the Thames*, &c; that the master died in the voyage at six months end; and that it did not return within the twelve months, though the dangers of the seas did not hinder, &c.—The defendant pleads, that the ship was at her departure, manned with the master, seven men, and a boy; that the ship failed to *Madeira*, the *Canaries*, and *Jamaica*; that she being there, six of the seamen in the same vessel at her departure, left the service of the said ship; that the master did not provide other seamen to serve in the said vessel and voyage; and that *ob defectum inde* she lay six months at *Jamaica*, and could not return, *infra duodecem menses: et hoc paratus est verificare*.—The plaintiff demurs.

MR. NORTHY and **MYSELF** argued, that these are *mutual covenants*, and not one pleadable in bar to the other; that there was a several remedy for each; that upon the record it appeared, the master died within the time, and so could not personally provide the seamen; that they had not averred him alive when the seamen departed; and that the exception excludes all other accidents.

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TREMAIN *à contra*. That they did not plead it as a failure of performing the plaintiff's covenant, but as a disability by means of the master, whereby they could not perform theirs; that providing of seamen was the act and duty of the master; that the freighters were not to provide seamen, nor could they, but the master must do that; and that this disability by the plaintiff's means was a good and sufficient excuse for them.

Upon which it was adjourned.

The next term it came on again; and **THE COURT** agreed it a good bar, if the non-performance of our part disabled them to perform theirs. (a)

(a) See the case of *Howlet v. Strickland*, Cowp. 56. *Hughes v. Richman*, Cowp. 125. *Hotham v. the East India Company*, Dougl. 272. *Jones v. Barclay*, Dougl.

684. *Boone v. Eyre*, 1 H. Bl. Rep. 273. notis. *Duke of St. Albans v. Short*, 1 H. Bl. Rep. 270.

But

But HOLT *Chief Justice* took exception to the plea, that it did not alledge that they had done their part, *viz.* that they had loaded the ship, or discharged her at *Jamaica*, or that they had dismissed her, and given orders for her sailing; and her demurrage there was upon occasion of want of seamen; and cited 3 *Cro.* 194. and *Fitz. tit. Debt.*

In pleading an excuse for non-performance the party must shew all done by him that he was obliged to do.

Carth. 32.
1 Lev. 145.
Doug. 684.
1 Term Rep 638.

And at last judgment was given for the plaintiff upon this reason
PER TOTAM CURIAM.

The King *against* Stone.

Case 199.

INFORMATION for perjury in an affidavit, where the defendant swears that A. B. and several others of a jury that tried, &c. had since the affizes acknowledged to the deponent, that they were treated at *Norwich* by the plaintiff in that cause before the trial thereof: *ubi revera et de facto*, the said A. B. and the several other jurymen, nor either of them did acknowledge they were treated at the said city of *Norwich* before the trial, nor were they treated by the said plaintiff, or any other, &c.

An assignment of perjury on a fact sworn to have been committed at *Norwich*, with an averment that it was not committed at the said city of *Norwich* is bad.

On not guilty pleaded, and verdict for the king.

S. C. Trem.
148.
1 Term Rep 69.

MR. NORTHEY and I MOVED an arrest of judgment, that here was no good assignment of perjury, because they might acknowledge that they were treated at *Norwich*, and not acknowledge they were treated at the city of *Norwich*, for those are different places, or may be so, and in this case this court is not to help the matter by intendment.

And PER CURIAM judgment stayed,

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* The King against Davis and others.

Case 200.

The court will not grant a new trial on acquittal of the defendant in a criminal case.

S. C. 12 Mod.

8.

1 Keb. 174. 546.

2 Ket. 403.

3 Keb. 179.

1 Lev. 9. 124.

1 Sid. 153.

2 Jones 163.

5 Mod. 350.

INFORMATION for an assault and riot tried at *Devonshire* assizes last, and a verdict for the defendants, that they were not guilty.

TREMAIN *Serjeant* moved for a new trial upon affidavits of the fact, and that the judges directions were to find the assault: which

I OPPOSED because in a criminal proceeding, and no corruption or practice shewed.

And a new trial was denied, for that THE COURT said, there could be no precedent shewn for it in case of acquittal. (a)

(a) See 10 State Trials, 416. 2 Hale, 310. 2 Hawk. P. C. ch. 47. s. 12. 4 Bl. Comm. 354. Salk. 646. 1 Willf. 298. 4 Burr. 2257. 5 Com. Dig. 153. Stra. 1238. 3 Willf. 59. 1 Stra. 101. Ld. Ray. 65. 5 Bac. Abr. and the case of Norris v. Taylor, Cowp. 37. where in an action for a malicious prosecution, THE COURT on a verdict for the defendant against evidence refused a new trial, because the suit was of a criminal nature.

But in an information in the nature of *quo warrants* the court will grant a new trial after a verdict for the defendant, for although in *Rex v. Bennet*, 1 Skin. 101. this was considered as a criminal prosecution, and therefore a new trial refused, yet of late years a *quo warrants* information has been considered merely in the nature of a civil proceeding, *Rex v. Francis*, A Term Rep. 484.

General Rule.

Michaelmas Term, 3 Will. & Mary.

Writ of *certiorari* to remove indictments, except from London and Middlesex, shall be made returnable on the first return day of the ensuing term, and recognizance entered into.

2 Hawk. 293.

1 Willf. 159.

1 Burr. 54.

OR DINATUM EST PER CUR. quod si aliqua persona in posterum prosequitur breve de certior' ad certificand' aliquod indictament' sive presentament' capt. in aliqua cur. in aliquo comitat' sive corporation. infra hoc regnum Angliæ except. civitat' London et com. Middlesex, tale breve fiat retornabil' super primum retorn. prox' termini prox' post emanation. talis brevis; quodq; eodem termino quo certificat. fuerit pars prosequens dict. breve procurabit duos homines fore obligat' in recogn. coram un' justic. hujus cur. ad placitand. ad indictament. Et. et si exitus superinde junct. erit ad triand. super noticiam prosecutori sive ejus clerico ad prox. assis. si tal. non cassetur, et in defectu hujusmodi recogn. ante finem ejus termini fiat procedendo; and no judgment to be filed till recognizance without motion in court. All certioraries to be returned at the return thereof, or within four days after, or to be amerced to forty shillings, and if wilful neglect, attachment.

HOLT Chief Justice.
DOLBIN,
GREGORY, } Justices.
EYRES,

See the statutes 5 Geo. 2. c. 19. and 13 Geo. 2. c. 18.

Hilary

* Hilary Term,

[337]

The Third of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Coke *against* Hawkins.

Case 201.

SUIT in court christian, for these words, "she had a baffard," spoken of a single woman. Motion for a prohibition, on a suggestion that the words are actionable at law. *CUR. dubitat.* *Adjournatur.*

Prohibition.

S. C. 12 Mod.

13.

F. N. B. 51.

Lutw. 1038.

Cro. Car. 110.

339. 2 Roll Abr. 297. 1 Sid. 404. 433. 3 Lev. 319. 1 Mod. 21. 1 Vent. 7. 61. 220. 2 Lev. 63. Jones, 44. Bunb. 312. Salk. 692. Stra. 823. 4 Com. Dig. 508. 2 Term Rep. 473.

Mallack,

Case 202.

Mallaçk, *qui tam*, against Spariug.

In an *affine* of debt on a penal statute the fact is sufficiently alleged by a *quod iure, &c.* but not in an *information*.

S. C. Cath. 216.
3 Salk. 636.

DEBT on the statute for felling of wine without license. The declaration stated *quod cum* he sold wine in his house at such a place such a day, and so till such a time, the which he sold without license *contra formam statuti*. On *nil debet* pleaded, there was a verdict for the plaintiff.

Motion was made in arrest of judgment that it was ill with a *cum*, because not positive but all recital, and therefore ill; otherwise if he had recited the statute; for the *cum* would have referred to the statute, and the other would have been an affirmation.

TREMAIN *à contra*. The selling without license is positively laid: besides it is in an action of debt, and there *quod cum* is well enough, and the precedents are so,

THE COURT. It is well enough; for the action is brought for non-payment, and so it is like debt on a bond. You do not recite now the statute of *tithes*, nor of *buc and cry*; and that for tithes is always so. *Co. Ent. tit. "Debt"* 161. The statute is not recited: this differs not at all from the case of debt on a bond. But it would be otherwise if it were in an *information*. (a)

And judgment for the plaintiff **PER TOTAM CURIAM**,

(a) Sed. vide 2 Roll Abr. 79. Plowd. 1. 4 Co. 48. Cro. Eliz. 236. Cro. Car. 229. 1 Bac. Abr. 39.

• [338]

Case 203.

The statutes 7 Jac. 1. c. 7. and 2 Geo. 2. c. 23. respecting attorneys bills may be given in evidence on the general issue.

Ante, 48. 96.
Bulf. N. P. 145.
Salk. 86.

• Millner, an Attorney, against Crowdall.

CASE for fees, &c. and *indebitatus* for fees and labour in *al' negot.* The defendant pleads the statute of 1 Jac. 1. c. 7. l. 1. (a); that no bill was delivered under his hand. Demurrer, because he hath not averred his plea.

ET PER CURIAM it is needless, if a negative plea.

Then insisted that it was for *al' negot.* and ill for that. And **PER CURIAM** this statute may be given in evidence on the general issue *non assumpsit*.

Bill referred to the master.

(a) Sec 2 Geo. 2. c. 23. l. 22.

Knight

Knight *against* Symmes,

Case 204.

EJECTMENT for five closes of pasture and arable called **FALDOWNE**, containing ten acres.

After verdict, it was moved in arrest of judgment, that it is too uncertain, not saying how many of the one, nor how many of the other. *Martyn v. Nichols*, Cro. Car. 573. Express in the case, and 1 Cro. 179. and *Savill's case*, 11 Co. 55. one close called DOVECENT CLOSE containing three acres, ill: and the case of *Weekes v. Sparrow*, Cro. Jac. 435, admits *Savill's case* for law, because not said what, whether land, meadow, or pasture; there good, because said *un' claus' vocat' D.* containing three acres *terre*, Cro. Car. 555. Ejectment *de domo repositoria anglie* A WAREHOUSE, ill, because not known by that name in the law, *Harper's case*, 11 Co. Yelv. 117. *Owen* 18. *Moore* 702. *Styles* 202.

E CONTRA. It was urged that it lies for *a close*, if a name be given to it, Cro. Eliz. 235. Cro. Jac. 435. Cro. Car. 126, 3 Leon. 218. 1 Sid. 295.

But afterwards held **PER CURIAM** to be ill in the principal case, and judgment was arrested, because not sufficient certainty. (a)

(a) The general principle of all the old cases upon this subject is, that, as judgment is for the purpose of execution, there should be such a precise description of the thing demanded as will enable the sheriff to deliver it with certainty to the plaintiff, *Ld. Ray.* 1470. *Run. Eject.* 29. But the practice now is for the sheriff to

deliver possession according to the direction of the plaintiff who therein acts at his peril, 1 Burr. 629. 5 Burr. 2673. and therefore a less precise description than is necessary in a *præcipe* has been allowed, especially after verdict. See *Stiles* 194. 1 Lev. 58. *Strat.* 71. *Cowp.* 347. 1 Term Rep. 11.

An ejectment for "five closes called *Faldowne* containing ten acres" is not sufficiently certain. *Sed quære*, S. C. 4 Mod. 97. S. C. Salk. 254. S. C. Holt, 263. S. C. Comb. 198. S. C. Carth. 204. Post, 364. Cro. Jac. 435. Cro. Car. 471. 573. 3 Lev. 96. 1 Sid. 295. *Run. Eject.* 28. *Ld. Ray.* 1470. 2 Bac. Abr. 170. 1 Burr. 137. 629. 5 Burr. 2673. *Cowp.* 347. 1 Term Rep. 11.

* The King *against* Alsop.

* [339]
Case 205.

INDICTMENT for shooting with hail-shot contrary to 2 & 3 Edw. 6. c. 14. found before justices of the peace at the sessions, and judgment *quod forisfacierit* ten pounds.

Error brought here; and error assigned that the justices of peace have no power given by this statute; and their commission only gives them power concerning the peace, and therefore this offence is only to be examined by commissioners of *oyer and terminer*.

PER CURIAM. *Prima facie* it seems that they have no authority.

HOLT Chief Justice. This statute creates a *new offence* after the making of the commission of the peace, and therefore this may be a

Justices of the peace have only jurisdiction by their commission over offences *contra pacem*, and therefore cannot try a *new offence* not against the peace, unless so empowered by the statute which creates it.

12 Co. 97. Cro. Eliz. 601. 697. 3 Mod. 280. 4 Mod. 147. 10 Mod. 213. *Fitzg.* 124. 1 *Ld. Ray.* 150. *Strat.* 66. 1 *Self. Cas.* 125. 2 *Strat.* 608. 2 Bac. Abr. 615.

question.

KING
v.
ALSOY.

question. This statute gives no direction, as does that in *Attwood's case*, Cro. Jac. 421. Oyer and terminer have a jurisdiction, and the naming them in an act of parliament, doth not give them more than they had before.

But THE COURT seemed unwilling to determine it; and therefore asked the counsel, if they had no other errors.

Vi et armis.

THEN it was urged that there was no *vi et armis*. *Sed non allocatur*; for that is needless.

Forisfacere in-
stead of foris-
faciat will not
vitiare a conviction.

THEN urged, that it was *forisfacere*, whereas it should be *forisfaciat*, for this difference is more material than *scire* and *sciri*.

An indictment
for shooting
contrary to 2 &
3 Edw. 6. c. 14.
must state the
county in which
the offender
stood.

THEN that he; "late of such a place, &c. did shoot at conies, "in a *canicote*," not being said in what county he stood and shot. In some places a man may stand in one county and shoot into two or three; and here it does not appear where the offence was committed, for that is where the party stood, or was, when he shot, not where the object he shot at was. (a)

10 Mod. 280.
3 Stra. 66. 858.
3101.

Reversetur.

2 Hawk. P. C. 335.

(a) See Coomb's case, Cases in Crown Law, 309.

Cafe 206.

* Pitcher against Tovey.

* [340]

Michaelmas Term, 2 Will. & Mary, Roll 61.

Covenant for
rent will not lie
against the af-
fignee of a term
for rent due af-
ter his assign-
ment over to
another, al-
though made
without notice
to the lessor.

ERROR on a judgment in the Common Pleas in action of covenant for rent brought against an assignee of a term for years for rent incurred after his assignment over to another, without notice to the lessor. And there by POLLEXFEN and ROOKSBY Justices it was held that an assignment by an assignee without notice was not good; and accordingly judgment given for the plaintiff in the action, against the opinion of POWELL and VENTRIS *ad tunc existentes contra*.

S. C. 4 Mod. 71.
S. C. Salk. 81.
S. C. 2 Vent.
234. 228.
S. C. 3 Lev. 295.
S. C. Carth. 177.
S. C. 12 Mod. 23.
S. C. Holt, 73.
2 Vent. 228.
Jones 223.
1 Sid. 447.

Now here argued for the plaintiff in the writ of error, that the case is no more this: A lessor brings covenant against the defendant as assignee of a term, for rent arrear; the defendant pleads, that as to part *cognovit actionem*, and as to the residue before the same became due, he assigned to J. S. who entered. The plaintiff demurs and judgment for the plaintiff, and inquiry general, that this plea was good; for there is no need of notice; for the assignee is

1 Ld. Ray. 320. 354. 368. 2 Ld. Ray. 1551. 1 Stra. 405. Swinb. 390. 2 Vern. 241. Prec. Chan. 156. 1 Bac. Abr. 536. Dougl. 183. 188. 444. 735. 2 Com. Dig. 564. 641. 642. 3 Burr. 1271. Stra. 1221. 2 Atk. 546. 3 Term Rep. 393.

only

only chargeable by virtue of the privity of estate, and that by his assignment is destroyed; and there is no need of notice: privity of estate is to be immediate, and that is gone by an assignment over, *Co. Lit.* 271. Where none is bound to give notice, there the other is bound to take notice at his peril, if necessary. (a) Besides, if he had no notice, he should have replied to it; for otherwise it shall be intended that he had notice: if there had been any averment of fraud or no notice, issue might have been taken upon it. (b)

PITCHER
v.
TOVEY.

BIRCH Serjeant à contra. The privity of estate is not gone so far as to bar the plaintiff of his action without notice; for how should the plaintiff know whom to have his rent from? At this rate it may be assignable from one hand to another, and so on *in infinitum*, and this plea may be to every action he brings against any one. And it is no answer to say he may distrain, for notice is necessary in all cases, where a prejudice may accrue, and a man cannot help himself; and cited 2 *Edw.* 4. pl. 3. *Cro. Jac.* 432. 1 *Bulstr.* 44. 1 *Rolls Rep.* 314. Acceptance of rent will not prevent a forfeiture of which the lessor had no notice. (c) **OBJECTION,** * the case of *Overton v. Siddall*, *Cro. Eliz.* 555. ---- there never was such a judgment: notice was not insisted on in that case; the great question was in that case whether, when against an executor it should be in the *debet et detinet*; and in *Poph.* 120, 121. the only reason is, that the action did not lie against the successor of the prebend: in *Moore* 35. the case is taken notice of, and he says that the court was divided: that case hath been adjudged no law in the case of *Hilliard v. Casbard*, *Sid.* 266; and in the case of *Buckley v. Keighley*. **HALES Chief Baron** was against it afterwards, and all the bar with **TWISDEN** against it.

* [341]

HOLT Chief Justice. That case in *Siderfin* was in the *detinet* only, and so not contrary to the other. Now what is it that makes the assignee chargeable at all? Is it not the estate? He had nothing to do with the lessor, but upon that account. A bargainee of a reversion shall maintain **DEBT for rent** from the time of the bargain and sale, though there were no notice to the lessee; and there is the same reason on the other side. The assignee hath the estate

See *Humble v. Glover*, *Cro. Eliz.* 328.

(a) See *Overton v. Sydal*, *Cro. Eliz.* 555. *Goates v. Hixte*, 1 *Roll Rep.* 314. *Hill v. Heming*, 1 *Roll Rep.* 285. *Porter v. Fry*, 1 *Mod.* 300. 1 *Roll Abr.* 468. *Godb.* 161.

(b) See *Humble v. Glover*, *Cro. Eliz.* 328. *Leonard v. Bacon*, *Cro. Eliz.* 234. *Hamberton v. Howgil*, *Hob.* 72. *Keighley v. Bulkley*, 1 *Sid.* 338. *S. C.* 2 *Keb.* 260. *Patchey v. Knight*, *Michaelmas Term*, 29 *Car.* 1. *Roll* 416. *Trotter v. King*, *Easter Term*, 34 *Car.* 2. *Roll* 397. *Christie v. Wilcox*, *Trinity Term*, 30 *Car.* 2. *Roll* 636. in the *Common Pleas*. *Iremont v. Newsum*, *Noy* 97. 8. *C.* *Latch.* 260.

See also *Lekeux v. Nash*, 2 *Str.* 1221. and *Bamfather v. Moffatt*, *Dougl.* 435.

(c) See *Penant's case*, *Cro. Jac.* 641. 2 *And.* 9. *Gurney v. Sayer*, 3 *Leon.* 95. the case of *Bulkley v. Keighley*, 1 *Sid.* 308. 338. in *Easter Term*, 19 *Car.* 2. *Roll* 194. See also *Doe* on the demise of *Cheney v. Ballen*, *Cowp.* 243. and *Den v. Harrison*, 1 *Term Rep.* 431. that it has been established by many cases that acceptance of rent shall not operate as a waiver of the forfeiture, or as a confirmation of the tenancy, unless the landlord has notice that a forfeiture was incurred at the time.

without

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v.
TOVEY.
See Lekeux v.
Nath, 2 Strange
1221.

without the consent of the lessor; and why may he not part with it again? That case of *Buckley v. Keiley* was agreed, and HALE Chief Baron was of another opinion afterwards in the Exchequer Chamber.

See Chancellor
v. Poole, Dougl.
764. Walker v.
Reeves, cited
Dougl. 444.

And afterwards judgment was here reversed PER TOTAM CURIAM, for that no notice is necessary: and the case of *Overton v. Siddall* affirmed for good law for that point of the *detinet*, for he is not chargeable in the *debet* and *detinet* after assignment.

Case 207.

Cheeveley against Bond.

Hilary Term, 3 Will. & Mary, Roll 307.

If a debtor be
beyond seas
when cause of
action accrues,
the creditors
may sue within
the time limited
after his return.

See 4 Term
Rep. 516.

Bills of ex-
change are with-
in the statute of
limitations.

S. C. 4 Mod.

105. S. C. Carth. 226. S. C. Holt, 427. Carth. 3. Ante, 98. H. Bl. Rep. 631.

CASE on bill of exchange. The defendant pleads the statute 21 Jac. 1. c. 16. of limitations. The plaintiff replies, the defendant was beyond sea, &c.

HELD, that the defendant's being beyond sea, doth not stop, or hinder, or excuse the plaintiff for not suing within the six years. (a)

And HELD ALSO that bills of exchange, and other transactions between merchants, are not excepted out of the said statute, but only an action of account.

(a) But now by 4 & 5 Ann. c. 16. s. 19. If any person shall at the time the cause of action accrues be beyond the seas, the person who is intitled to the action shall be

at liberty to bring it against such person at any time within six years after their return.

Case 208.

* Moore against Furden.

* [342]

In ejectment
tenants in common
must make se-
veral leases, for
they are in by
several titles.

S. C. Carth. 224. S. C. 2 Vent. 214. S. C. Comb. 190. Co. Lit. 200. Moor 682. 6 Co. 14. Cro. Jac. 166. 2 Will. 100. 232. Run. Eject. 100. 3 Term Rep. 15. 2 Stra. 1181. Cowp. 219. 1 Term Rep. 759. notes.

EJECTMENT. Special verdict. Held, that two tenants in common lessors, must make several leases in ejectment.

Quod cum is well enough, because the ejectment is positive.

Stockhold *against* Collington.

Case 209.

CASE; for that the plaintiff at the request of the defendant, had served the defendant as a commissioner on a certain commission out of the exchequer, directed to the plaintiff and others for the examination of witnesses as well on the behalf of the defendant as others in a certain suit then *coram baronibus* of the exchequer aforesaid depending, the defendant in consideration thereof promised to pay, &c. so much as the plaintiff deserved for his labour as such commissioner aforesaid; and averred that he deserved for work and labour as a commissioner five pounds; AND ALSO that the plaintiff at the request of the defendant had written divers depositions in a certain cause, and had found and provided divers parchments, and other necessities for engrossments, &c. *Non assumpsit* pleaded. General verdict, and damage for the plaintiff.

An *assumpsit* lies on a promise to pay in consideration of the plaintiff's having served as a commissioner at the request of the defendant on a commission out of THE EX-CHEQUER, in a cause depending before the baron.

S. C. 12 Mod. 9.

S. C. Salk. 330.

S. C. Comb. 186

S. C. Carth. 208.

S. C. Holt. 7.

TREMAIN *Serjeant* moved in arrest of judgment, That in the first count here was no consideration, it being unlawful to take money; for the service is by command of a court. SECONDLY, That the court of equity was held before THE CHANCELLOR, &c. and the *English* bills always directed so, and therefore there could be no such cause depending *coram baronibus* as to take depositions, &c. and judgment ordered to stay *quousque moveretur ex altera parte*.

E CONTRA. As to the last I answered, that the very writ of *subpoena* was to appear *coram baronibus*, and had several in my hands, which I produced to the court; and the very *subpoena* in our case was so, and our declaration was according to that. Then for the other here is a good consideration, for he doth serve the party as commissioner; he is named by the party, for both sides do name in such cases; and this is for labour and pains only, and those bestowed at the defendant's request. He was not bound to this under any oath of office, and it is a service to the party to attend it. Now it is usual for masters in chancery to take for their pains, if they take an answer at * a nobleman's house, &c. Commissioners of bankrupts are constantly paid. In the case of *Sir George Moore v. Foster*, *Yelv.* 62. *Cro. Jac.* 65. Commissioner had taken bribes, &c. not actionable *per FENNER* and *WILLIAMS*, because voluntary and at election of the person to sit or not. It is not in a judicial course, nor upon oath; and if he refuse to sit, the suitor hath no remedy by action against him, for himself names the man, and not the court: and though perhaps his refusal will be a contempt to the court, if without excuse, yet doubtless they will never punish the person for it, unless his reasonable charges were allowed: though it be a proceeding in a court of equity, yet you will take notice of the labour, and an action will lie for labour and pains in soliciting a cause in equity, as was in the case of *Ambrose v. Ifed*, here in this court. The books have cases in them stronger than this, as

* [343]

Anderley's

STOCKHOLD
v.
COLLINGTON.

Anderley's case cited in *Noy 76. Latch. 55, 56, assumpsit* to a stranger in consideration of his labour and pains in assisting of the sheriff, is good, because voluntary, and at the parties request. The reason why it is otherwise when made to a sheriff, is because he is an officer, and such practice encouraged would promote extortion; so it is of a bailiff, but otherwise lawful to a stranger.

And PER TOTAM CURIAM the action lies; and my client had his judgment.

Case 110.

Drew and others against Barkdale.

Mich. Term, 2 Will. & Mary, Roll

To a *scire facias* on a judgment in debt; the defendant pleads payment at *Exeter*, and on issue on non solvit at *Exeter*, a trial is had in *London*. This misprision of the venue is aided, after verdict for the plaintiff, by the 16 & 17 Car. 2. c. 8. *Sec. 2^a*.

1 Saund. 248.
1 Vent. 263.
1 Danv. Abr. 456.

1 Mod. 199.
2 Mod. 24.
3 Lev. 394.
2 Lev. 122.
Sec vide

1 Lev. 207.
1 Sid. 326.
1 Mod. 37.
1 Vent. 48.

See *Mellor v. Barber*, 3 Term Rep. 387.

* [344]

SCIRE facias directed to the sheriff of Middlesex, *nos accipient' in record et process'*, &c. manifest error to have intervened, and therefore the record we have caused to come before us *coram nobis jam resident'*, and that *John Barkdale*, 19 May, anno secundo, came before SIR HEN. POLLEXFEN Chief Justice of the Common Pleas at his chamber in the Inner Temple, *London*, and there entered into a recognizance for the due prosecution of the writ of error with effect, and to pay the condemnation if affirmed, *prout per record' recognit' pred. in curia nostra coram nobis jam resident' similiter' constat*, and that the judgment was affirmed, and the damages not paid, *ideo scir. fac. &c.* The defendant pleads that the defendant *Palmer* paid the money at *Exeter*, where the first action and trial was had. The plaintiff replies *quod non solvit modo et forma, et hoc petit quod inquiretur per patriam, &c.* The plaintiff takes out a *venire facias* to *St. Clements Danes*, and a trial is had thereon, and a verdict for the plaintiff.

* I MOVED in arrest of judgment. FIRST, because the trial was not in the proper county.

But PER TOTAM CURIAM *preter HOLT Chief Justice*, That that is helped by the 16 & 17 Car. 2. c. 8. though the county be wrong, and though in a *scire facias*.

If a judgment given in the Common Pleas, be affirmed, upon a writ of error in the King's Bench, the court may award a *certiorari* to remove the judgment of the bail, and then a *scire facias* lies against the bail out of the King's Bench. — S. C. Comb. 199. 1 Sid. 213. 1 Roll Abr. 884. Dyer, 306. 1 Lev. 134. 4 Mod. 404. Hutt. 117. 5 Mod. 421.

Then I URGED that, FIRST, *Non constat* how this record came hither, or that it can be removed hither; for it is a recognizance before the C. J. POLLEXFEN, and usually and originally suable there. Nay can be sued no other where by *scire facias*, for that must be out of the court where the record is, and that is in the Common Pleas. Debt and *scire facias* are entirely different; the

DREW
v.
BARRSDALE.

One is a new original, the other only a judicial process: this recognizance cannot be removed by virtue of the writ of error, though that be to remove the record *cum omnibus ea tangentibus*; for this is a distinct record. A writ of error may be brought, and no such recognizance at all; for if I will not have a *superfedeas*, or need not, because execution is executed, there is no recognizance. It is given by a particular law for a particular reason and purpose, and therefore collateral and distinct. Suppose the writ of error be misdirected, or a variance between the *loquela* of the writ and the record, so that the record is not removed, this cannot be removed; but suppose they have sued a *certiorari* on purpose to remove this recognizance, that must needs be useless; for this court hath nothing to do with it. Then the removing it hither to sue it here, is to alter the law; for it prevents the bail of that appeal which they would have by writ of error here, if sued below: the authority of *Fitz. N. B.* 245. is only general, that a *certiorari* lies, and the instances there mentioned, are only to *oyer* and *terminer* and *sessions*: surely it will not be pretended that a *certiorari* and *scire facias* here may be upon any other recognizance in that court; and by the same reason this is, all others are removeable by the same means. Now 3 Jac. 1. c. 8, which enjoins this recognizance, orders it to be taken there, and consequently suable there. If bail be put in the Common Pleas in an original action, and a writ of error brought, it doth not remove the record of the bail, being no part of the judgment roll: there is not one precedent in all the printed books of any such *certiorari* granted, or ever sued. If a writ of error be brought on a judgment in an inferior court, and bail not certified nor diminution alledged, and the judgment be removed, you cannot remove the bail below by *certiorari*; for this court will not execute their judgment, 1 *Saund.* 98.

* THE COURT after deliberation and search into precedents, had account of seven or eight in all, the first thirty years since, but none on debate. However they ruled it good; for this reason, as I suppose, because *ampliat jurisdictionem*; and it is no prejudice to the suitors, but rather an advantage, because no writ of error lies from hence upon such *scire facias*, but in parliament. * [345]

Meacock and his Wife against Farmer.

Case 211.

TRESPASS, by husband and wife, for a battery of the wife, and taking the goods of the husband then and there, *ad damnum ipsorum*. General verdict; thirty pounds damages.

Moved, in arrest of judgment, that they could not join, because the *tert* concerning the goods could not survive, and therefore ought she not to be joined.

is bad. — *Stiles.* 155. *Cro. Jac.* 655. *Cro. Car.* 555. *Bull. N. P.* 20. 5 *Com. Dig.* 294. 3 *Term Rep.* 627. 1 *H. Bl. Rep.* 108. 114.

VOL. I.

Y

IDID

A declaration in trespass, by husband and wife, for a battery on the wife, and for then and there taking the husband's goods *ad damnum ipsorum*

: 19

MEACOCK
v.
FARMER.

I DID *à contra* endeavour to answer the exception, notwithstanding the authorities against me in the *Register* 105. is express as words can make a case.

NOTA, That one may have a joint action for goods taken, but of battery or such personal trespass, the action ought to be sole, unless in the case of husband and wife. And if the husband and wife do bring a writ of trespass for a battery, and for goods taken, the writ shall be of the goods of the husband; for the wife can have no property in the goods during the coverture, viz. *fi A. et B. uxor ejus, &c. pone, &c. quare, &c. in ipsum B. apud, &c. insultum fecit, &c. Et bona et catalla ejusdem A. ibidem invent' ad valentiam, &c. cepit et asportavit et alia enormia, &c. ad grave damnum ipsorum A. et B.* These are the words of the book, and the writ; and by this was our declaration drawn.

THE COURT seemed to wonder at my pretence of justifying the declaration, till I read the words of *the Register*, by which MR. DOB had made his narration. But however they were all of opinion according to the constant tenor of the more modern authorities.

Hob. 224.
Keilw. 434.
Cro. Jac. 473.
355. 655. 664.
2 Keb. 813.
Cro. 175.
553.

* Another case I cited, which was as strong, 2 *Inst.* 236. A man dies seised of land in right of his wife, or jointly with his wife, and his goods are taken away. In an *affize*, brought by the husband and wife, he and his wife shall recover seisin of the land; and he alone upon that original brought by him and his wife, shall have damages; which is worthy of observation; and there he cites 11 *Hen.* 6. 16. which is accordingly.

* [346]

Judgment was arrested.

* Easter Term,

• [347]

The Fourth of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt. }

Sir WILLIAM GREGORY, Knt. } Justices.

Sir GILES EYRES, Knt. }

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Samborne against Belke.

Case 212.

Trinity Term, 3 Will. & Mary, Roll 155.

HELD PER CURIAM. That if there be a tenant to the *precipe pendente placito* before judgment, it is well enough though there were none at the time of suing out the *precipe*. And per HOLT Chief Justice, a tenant hath been made frequently after the return of the *precipe* and a voucher. (a)

A tenant to the *precipe* may acquire the freehold at any time before judgment.

Holt, 614.

Carth. 472. 2 Salk. 568. 1 Ld. Ray. 227. 475. Pigot, 28. Cruise, 18. 5 Com. Dig. "Pleader," (3 A. 3.) 1 Stra. 27. Cowp. 702. Hargrave's Co. Lit. 204. notis.

(a) But now by the 14 Geo. 2. c. 20. It is enacted "that every common recovery shall be deemed good and valid to all intents and purposes notwithstanding the fine, or deed or deeds, making the tenant to the writ, should be levied or executed after the time of the judgment given in such recovery, and the award

"of the writ of seisin, PROVIDED the same appear to be levied or executed before the end of the term, great session, session, or assizes in which such recovery was suffered, and the person joining in such recovery has a sufficient estate and power to suffer the same." See also 24 Geo. 2. c. 43. s. 8.

Y 2

Potter

Case 213.

Potter *against* James.

An *indebitatus* must state upon what the debt arises.

S. C. Comb. 187. S. C. 12 Mod. 16.

ERROR on judgment in *indebitatus* for so much money then due and unpaid. **AND REVERSED** because not laid upon what account.

Case 214.

Burges *against* Steer.

On a prescription for common for sheep a verdict finding it for sheep and cows is good.

S. C. 4 Mod. 89.

S. C. Carth. 219. Cowp. 766.

IN pleading, the prescription was for common for sheep; and issue being joined thereon, the jury find common for sheep and cows too. **AND HELD** that the issue was found for the plaintiff who claimed the common; and judgment accordingly given for the plaintiff. *Vide Grey's case, 5 Co. Thorowgood's case, 1 Brownlow, Hob.*

53.

Case 215.

* Mudge *against* Bridges.

* [348]

Præsumptio when to be laid in the *ward of Cheap*.

6 Mod. 228.

10 Mod. 255.

Latch. 4. Lutw. 950. 2 Ld. Ray. 1042. and see the case of *Moflyn v. Fabrigas*, Cowper 176 to 181, that every transitory action may be laid in any county in *England*, though the matter arise beyond the seas, but a place in *England* must be alleged *pro forma*.

PER CURIAM held, that if the contract be laid in *London*, and a collateral matter, or the thing contracted for, be done beyond the seas, you need not alledge it done here in the *ward of Cheap*.

Case 216.

Carter *against* Homer.

Hilary Term, 2 Will. & Mary, Roll 324.

* All the rest of my *estate* carries a *fee simple*.

S. C. 1 Eq. Abr. 177.

S. C. 4 Mod. 89.

Stiles, 281.

2 Lev. 91.

2 Ch. Caf. 262.

Salk. 234. 236.

6 Mod. 106.

Cases, T. T.

110. 157. 285.

1 Ld. Ray. 187.

193. 295. 386.

EJECTMENT. Special verdict. A. seised in fee of a messuage, and also of copyhold land, makes his will, and in it are these words; "all the rest of my *estate*, whether freehold or " copyhold, I devise one third part to my wife, and the rest to my " children, equally to be divided between them."

TRINDER Serjeant argued that this carried a fee; the word "*estate*" in legal signification, being the *interest* which he had in the land. *Sed altera parte minime parat.*

Adjournatur. (a) Vide Cro. Car. 447.

2 Ld. Ray. 831. Prec. Chan. 37. 264. 471. 2 Peer Wms. 335. 523. 3 Peer Wms. 2 Bac. Abr. 55.

(a) It was held that the word "*estate*" must signify the interest he had in the land, and so pass a fee. S. C. 1 Eq. Abr. 177. See Stiles. 281. 2 Lev. 91. 1 Mod. 100. 2 Chan. Caf. 262. See also *Hogan v. Jackson*, Cowp. 299. *Loveacres v. Blight*,

Cowp. 352. *Den v. Gaskin*, Cowp. 660. *Right v. Sidebotham*, Dougl. 763. *Cowper v. Martin*, 1 Term Rep. 411. *Fletcher v. Smiton*, 2 Term Rep. 656. *Burkit v. Chapman*, H. Bl. Rep. 223. *Dally v. King*, H. Bl. Rep. 3.

Buck

Buck *against* Barnard.

Case 217.

ON trial, before HOLT Chief Justice, in debt for rent; held by him, that an *administrator* is chargeable as *assignee* for the time he enjoys it, and is in possession; and verdict accordingly for the plaintiff upon that evidence, the declaration being against the defendant as assignee,

An *administrator* may be charged as *assignee* in debt for rent.

S. C. Holt, 75.
1 Roll Abr.

603. 5 Co. 31. 3 Lev. 74.

* Winchurch *against* Belwood and others.

* [349]

ERROR to reverse a fine.—MR. BONYTHON now argued, that the writ ought to abate, because no such writ lies *coram vobis resident*. for here is no record to warrant it. The record remains in the Common Pleas till judgment for reversal. Here is only a transcript. *Cro. Jac.* 384. 1 *Leon.* 114.

Case 218.

On a writ of error to reverse a fine, a transcript only is removed; but if the fine be erroneous the court may send for the record itself, and reverse it, or direct a writ to C. B. to take it off the file.

MR. NORTHEY *e contra*. It lies upon the transcript, 2 *Leon.* 157. *Herne's Pleader*, title "Error," 1 *Yelv.* 118.

S. C. Salk. 337.
S. C. Lilly Ent. 278.

THE COURT in case of the Exchequer Chamber before the lord treasurer, no error *coram vobis* lies, because they have a particular authority only to affirm or reverse. Upon the bringing the writ, THE CHIEF JUSTICE certifies the record and process of the king's silver, and THE CHIROGRAPHER it is true doth certify a transcript, but when reversed, the foot of the fine is sent for here, and actually cancelled. This is more than is from *Ireland*, and yet the writ of error in that case says, the record is here. The first writ of error to the Chief Justice says "RECORD," though to the *custos brevium* and *chirographer* it says only A TRANSCRIPT." *Adjournatur.* (a)

5 Co. 36.
1 Salk. 341.
Fitz. N. B. 20.
Holt, 322.
Cruise on fines, 296.

(a) It is said S. C. 1 Salk. 338. THE COURT held that the writ of error *coram vobis resident*, lay, notwithstanding only a transcript, and not the record itself is removed.

And see the case of *Fazackerly v. Baldo*, 6 Mod. 177. 1 Salk. 341. and *Vicars v. Haydon*, Cowper 843.

Pentin *against* Jenkyns.

Case 219.

TREPASS for an assault and battery. The defendant *venit et defendit vim et injur' quando*, &c. and says that the plaintiff was *alienigena, et natus extra ligeantiam in partibus transmarinis, viz. at St. Maloe's in France, sub obedientia Lodovici, &c. inimici regis et reginae*. And demurrer,

Alien-né may be pleaded without laying *de patre et matre*.

EXCEPTION taken, FIRST, because it doth not say *de patre et matre*. And held well enough.

2y. If *alien-né* is well pleaded with full defence.

Then SECONDLY, there is a full defence. And for that cause THE COURT inclined that it was ill pleaded.

1 *Ld. Ray.* 117.
Post, 387.

Adjournatur,

Case 220.

Miles *against* Etteridge.

A license to inclose common, may be pleaded as a release of common.

* [350]

TRESPASS for throwing down of fences. The defendant justifies in right of having common. The plaintiff replies, that the defendant's father, under whom he claims, did give *license* for to make and continue the inclosure to him and his heirs; and issue * joined thereon *utrum licentiauit modo et forma*; and verdict for the plaintiff.

THOMPSON *Serjeant* moves, in arrest of judgment, that this is an immaterial issue.

PER CURIAM. It is ill by way of *license*, but it is good by way of *release of common*; but a license is determined by his death. A release of common in one acre is an extinguishment (a) of the whole common.—Stayed until it should be moved on the part of the plaintiff. *Et Cur. advisare vult.*

(a) 4 Co. 37. 8 Co. 136. 4 Mod. 365. Carth. 432. Co. Lit. 122.

Case 221.

Winsford *against* Smith.

Hilary Term, 2 William and Mary, Roll III.

If there be a covenant in a marriage settlement to levy a fine to certain uses, a devise confirming the uses is good, though the fine is not levied.

S. C. 1 Salk. 125.

S. C. 4 Mod.

131. S. C. Comb. 195. 1 Lutw. 96. 1 Vent. 66.

IN EJECTMENT. Special verdict finds a covenant, on marriage of son, to levy a fine to certain uses, and no fine levied; and a will ratifying and confirming all those several estates, lands, and tenements granted and settled by my settlement on my son's marriage.

Held PER CURIAM, that they pass by the will, though no fine or other assurance was in reality had, because the intention of the party doth sufficiently appear. See *Cro. Jac.* 145. 1 *Rolls Abr.* 611, *Cro. Car.* 447. *Poph.* 188.

Case 222.

Dare *against* White and his Wife.

In assault and battery against husband and wife, they may be found respectively guilty or not guilty.

Cro. Jac. 118.

TRESPASS for an assault and battery, for a battery by both. On not guilty pleaded; the jury find the husband *not guilty*, and the wife *guilty*.

And PER CURIAM well, for they may find one guilty, and the other not; and there is no difference between this and other cases of different and several trespassors. And judgment was given for the plaintiff. See *Reg.* 105. *Yelv.* 106, 107. 1 *Mod.* 140. *Cro. Jac.* 303. 1 *Cro.* 294.

Jackson

Jackfon *against* Salway.

Case 223.

ACTION for disturbing a watercourse, with a *currere debuit* only, and says not "*solebat*." *Quære*, if not good. (a) Disturbing a watercourse *currere debuit* is sufficient.—S. C. Skin. 316. Ante, 64. and the cases there cited.

(a) It is said, S. C. Skin. 316. that the Court, after consideration, held it to be well enough, it being in a possessory action; and the case of *St. John v. Moody*, 1 Vent. 274. 2 Lev. 148. was cited.

* Fortre *against* Fortre.

Case 224.

* [351]

MR. WARD moved for a *mandamus* to the ecclesiastical court, to grant administration to the wife of the goods of her husband deceased. Administration of the husband's goods may be granted to *the wife*, or *next of kin*; otherwise of the wife's goods.

And denied *PER CURIAM*, for they may grant it to *the widow*, or to the *next of kin*, which they please; so held in *Sir George Sand's case*. But where the wife dies, the husband is to have the administration, being the only true and lawful *next of kin* by the statute of 31 Edw. 3. ft. 1. c. 11. (a)

S. C. Salk. 36. S. C. Holt 42.

(a) See the statutes 22 and 23 Car. 2. c. 10. and 29 Car. 2. c. 3. f. 25. 4 Co. 51. 231. Raym. 93. 1 Sid. 409. 2 Bac. Abr. 415. 1 Roll. Abr. 910. Cro. Car. 106. 1 Mod.

* Trinity Term,

* [352]

The Fourth of William and Mary,

I N

T H E K I N G ' s B E N C H.

Sir JOHN HOLT, Knt. Chief Justice,

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General,

Sir JOHN SOMERS, Knt. Solicitor General.

Parker against Edwards and others.

Case 225.

TRESPASS, for assault and false imprisonment, against the defendant, who was vice-chancellor of Oxford.

A claim of *conusance* must be in person, or by attorney.

THE CHANCELLOR, the *duke of Somerset*, claims *conusance* by attorney, and sets forth the privileges of the university confirmed by such act of parliament (a), which directs it to be allowed, upon any notification or signification of such their privileges.

S. C. Holt. 181.
2 Vent. 33.
1 Salk. 343.
450.
Skin. 665.
2 Will. 310.

But rejected *PER CURIAM*, because he had no warrant of attorney in Latin under the seal of the chancellor; for it ought to be claimed either in person, or by attorney, or otherwise there is no party in court to claim it. The like rule was in the case of the *bishop of Ely*, as *HOLT Chief Justice* said. And he said that in

(a) See 14 Rich. 2. the 14 Hen. 8. and 13 Eliz. c. 21.

case

PARKER
v.
EDWARDS.

case of the *Isle of Ely*, there is a day given to appear, upon the allowance of conuance claimed before the particular judge, and a re-summons hither in case there be a failure of right; but in case of THE UNIVERSITY it is otherwise, no such claim can be after imparlance. (b)

(b) See the cases of *Woodcock v. Brooke*, 9 Geo. 3. 2 *Wilson*, 406. in which the in Easter Term, 9 Geo. 2. Annally's Rep. proceedings on a claim of conuance are particularly explained.

Case 226.

* *Russel against Oldish and others.*

* [353]

The court of the constable and marshal cannot punish private persons for marshalling funerals or painting arms contrary to heraldry.

S. C. 4. Mod.
128.

Ca. Parl. 61.
67.

Hob. 121.

1 Roll. 87.

1 Sid. 352.

7 Mod. 128.

Salk. 55. 535.

553.

2 Lev. 134.

4 Inst. 126.

1 Lev. 230.

Show. P. C. 60.

4 Com. Dig.

488.

1 Hale 500.

2 Hawk. P. C.

15, 16.

1 Bac. Abr. 602.

PROHIBITION, moved for by MR. CONYERS, to the court marshal, in a suit there against the plaintiff for assuming to, and upon, himself to make arms, order funerals without authority, and painting arms contrary to the rules of heraldry, and the degree and quality of the persons concerned. They were incorporated only in the time of *Philip and Mary*, and they have no power for the ordering and marshalling of funerals. The office of heralds, it is true, was time out of mind; in the fourth year of king *Edward the First*, was a patent nominating *A. B. AN HERALD*, but for these things they are not within their office, and he cited *Russel. 2 vol. Appendix*. And thereon prayed a prohibition.

SERGEANT DARNEL *e contra*. No prohibition lies; for by 13 *Rich. 2. c. 2.* a privy seal lies to surcease a suit there which exceeds their authority, and privy seals have issued accordingly, 13 *Hen. 4. 45.* Besides the court of honour (a) is a court by prescription, 3 *Inst. 126.* and that court hath jurisdiction or power to determine all matters of honour. If they have any jurisdiction, they have of this, for giving arms at funerals contrary to, and above the quality of the person, *Parker's case, Sid. 553.*

HOLT Chief Justice. It deserves debate: for if these things do belong to their respective offices, then there is an action at law for the wrong. Therefore let there be a prohibition, and the plaintiff declare, &c.

(a) See 2 Hawk. P. C. 17.

Case 227.

Calliford against Blawford.

If a statute give a penalty to the party grieved, provided he sue for the same in three months, and if he shall not sue, then to any person who shall sue; a stranger who sues for this penalty, being entitled to the whole of it, is not a common informer, within 31 *Eliz. c. 5.* and therefore not obliged to commence such suit within the year.—A *latitat* sued out within the year is a sufficient commencement of the suit to avoid the statute of limitations.—S. C. 4 Mod. 129. S. C. Comb. 194. S. C. Carth. 232. S. C. 12 Mod. 26. S. C. Holt 522. S. C. cited *Ld. Ray. 78.* Bull. N. P. 195. 3 Com. Dig. 516. 2 Hawk. 385, 386. 3 Bac. Abr. 506. Dougl. 235.

THE plaintiff brings an action on the statute 23 *Hen. 6. c. 14.* for a false return of a burgess for *Dorchester* (the defendant being mayor) on that clause which gives to the king the penalty of forty pounds, and moreover to the party chosen, and not returned,

or to any other person as, in default of such person chosen, will sue, forty pounds: the party grieved to bring his action within three months after the commencement of the parliament; and if he do not, any other to have the same action.

CALLIFORD
v.
BLAWFORD.

* On the general issue pleaded, the evidence was that *a latitat*, was sued out within the year, but the bill filed above a year after the cause of action, and verdict for the plaintiff; but the *postea* stayed till the opinion of the Court was had thereon.

* [354]

And now by EYRES *Justice*, the question is, Whether this plaintiff be a *common informer*, that he must bring his action within the year by force of 31 Eliz. c. 5. And I am of opinion that he is not an informer within that law: he is not the party grieved, but comes in default of the party grieved, and the king hath nothing of the penalty. A common informer within that statute is only where he is to have but part of the penalty. The 31 Eliz. c. 5. limits no time, where the party is to have the whole penalty, no more than it doth to the party grieved (*a*), and therefore he is not a common informer within the statute; and if he were, the bringing of *a latitat* is a good commencement of the suit, *Sid.* 53. and therefore judgment ought to be for the plaintiff.

GREGORY *Justice ad idem*. That the party who sues in default of the party grieved, is not limited to any time, nor within 31 Eliz. c. 5.

DOLBIN *Justice* doubted, if it be not within 31 Eliz. c. 5. but clear of opinion, that the *latitat* sued out is a sufficient commencement of the suit, and it hath been always held good to avoid the statute of limitations, and as good as *an original*. No advantage can be taken of this upon evidence, but upon pleading the statute of limitations.

HOLT *Chief Justice*. Here is fourscore pounds to be forfeited; forty pounds to the king; the party grieved is to have another forty, and now comes an informer in his default, and in his default brings this action for his own penalty only: if the king were to have nothing, then he is out of 31 Eliz. c. 5. but here the king is to have a part. Suppose he had brought his action for the whole, the king's and his own, would he not be within 31 Eliz. c. 5.? I do for my part, doubt this matter. THEN for the *latitat*, though it be good to avoid the statute of limitations, yet it is not good to charge a man with a penalty. In the former he cannot take advantage of it, but upon pleading, but here advantage may be taken of this upon the general issue, and this man might have sued out *an original* if he would. A *latitat* was never construed to be a commencement of a suit upon a penal law, and the time must be reckoned from before the filing of the bill; the bill ought to be within the year (*b*). But for the other point I doubt.

(a) See Noy 71. Cro. Car. 336. 11 Co. 65.

(b) See the case of Morris v. Harwood,

1 Black. Rep. 312. 320. 3 Burr. 1241. Bull. N. P. 195. Dougl. 313.

CALLIFORD

BLAWFORD.

* [355]

* EYRES *Justice*. He could not have brought his action for the king's penalty, for that is distinct; then forty pounds more to the party grieved, then he comes in default of the party grieved, and can only demand that forty pounds.

HOLT *Chief Justice*. Why could not the king's penalty be sued for by him? If the informer sued after the year for both, it is ill for his own, but should serve for the king, because he hath two years.

EYRES *Justice*. They are two penalties in several rights.

HOLT *Chief Justice*. They are one penalty severally distributed; they are but for one offence, and the informer may sue for both.

Judgment for the plaintiff. (c)

(c) Judgment was given for the plaintiff, B. C. 4 Mod. 130. S. C. Comb. 195. but a writ of error was brought, S. C. Carth. 234. S. C. Holt, 522; and it is said that TREBY *Chief Justice*, ROXBURY *Justice*, and POWELL *Baron*, held that the judgment ought to be reversed, because the false return was laid to be in March, 1689, and the bill was filed in Easter Term, 1690, so that it appeared upon the record that more than a year was elapsed; but NEVILL and POWELL *Justices*, and LECHMERE and NEVILL *Barons*, were, on this point, of a contrary opinion. And it was resolved by the majority of the judges then present,

that where the informer ought to have the whole penalty, the statute 31 Eliz. c. 5. does not extend to it, because it is not within the words of the act, and penal acts are not to be extended by equity. But TREBY *Chief Justice* and POWELL *Justice* were of contrary opinion, for if the informer be bound when the queen is joined with him, much more should he be bound when he sues by himself. See the case of Chance v. Adams, 1 Ld. Raym. 77, 78. and the case of Lookup v. Frederick, 4 Burr. 2018. Bull N, P. 195.

Case 228,

Mason against Hanson.

A declaration as administrator, alleging that administration was committed by A. surrogat' at official B. prebend' prebend' without cui administratio pertinet, is good after verdict.

S. C. 4 Mod.

133.

S. C. Comb.

196.

Post. 408.

Cro. Jac. 89.

556.

Moore 367.

Cro. Eliz. 341. 431. 791. 1 Sid. 228. 8 Mod. 244. 10 Mod. 21. 11 Mod. 223. 12 Mod. 100. 385.

443. Lutw. 408. Skin. 551. 1 Salk. 38. 40. 1 Ld. Ray. 562. 2 Ld. Ray. 856. 1037. 1071. 1207.

1216. 1510. 5 Com. Dig. "Pleader," (2 D. 10.) 1 Peck Wms. 753. 1 Str. 412. 2 Str. 716. 781.

2 Bac. Abr. 442.

ACTION brought as administrator and sets forth administration to have been committed to him per A. B. surrogat. et official' J. S. prebendarii prebendæ de D. et habuit particular' jurisdiction.

Urged to be ill, because not said that he had an authority to grant administrations; and the difference cited between "ordinarius" and "a peculiar;" for the one is intended to have a jurisdiction, and the other not unless shewn. In the case of a bishop, he need not say cui pertinet, &c. But otherwise of a prebend. There was cited pro et cont. Cro. Eliz. 431, 791, 879. Sid. 228. 302. Styles 282. 236. 2 Rolls Rep. 124. Palmer 97. Barret v. Winchcomb, Cro. Jac. 360. Hob. 38.

But PER CURIAM the modern authorities are against that of Hob. In Sid. 98. 1657. in the case of the lord Moore v. Baughton

held,

held, that want of *profert* is ill, only upon demurrer, where shewn for cause. That this would be ill on *demurrer*, for it doth not appear that the place *WHERE*, &c. is within the prebendary: but a verdict helps it, for the words of the statute 16 & 17 *Car. 2. c. 8.* of *Jeofails* are, "that if any verdict of twelve men shall be given in any action, judgment thereon shall not be stayed or reversed for default of alledging the bringing into court of letters testamentary or letters of administration, &c. &c. but all such defects and omissions, and *all matters of like nature* not being against the right of the matter of the suit, nor whereby the issue or trial are altered shall be amended, &c." (a)

PER CURIAM judgment affirmed for the plaintiff.

(a) And by 4 Ann. c. 16. this statute is extended to judgments upon confession, *nihil dicit*, or *non sum informatus*; and it is also enacted that the default of alledging of the bringing into court letters testamentary or letters of administration

shall not impede the judgment "except the same shall be specially and particularly set down and shewn for cause of demurrer." See also the case of *Crawford v. Whittall*, Dougl. 4. nota.

* Hilary Term,

The Third of William and Mary,

IN

THE KING'S BENCH.

• [356]

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

} Justices.

Bellamy against Upton.

Case 229.

BELLAMY, in the sheriffs court *London*, is plaintiff, against *Morley* in a plea of debt upon demand of fifty pounds, *nec non de attachiamento superinde fact' de fifty pounds, in pecuniis numeratis ut de denariis dict' defend' propriis in manibus et custod' JOHANNIS UPTON un' assistent' et defens', &c.* And upon *nil habet* pleaded by UPTON.

Quere if monies due by a consignee for the freight of goods, is liable to be attached in his hands by the custom of foreign attachment, in part payment of a debt due to a third person from the captain who signed the bill of lading, after he has delivered the

The jury find, that the said *Morley* at the time of making the attachment, &c. was master of the ship called *Mount-eagle*, and that the garnishee had *diversa bona et catalla in dicta nave onerat'* to the said garnishee from parts beyond the seas consigned, and that the freight thereof amounted to thirty pounds: that there was no charter-party made between the defendant *Morley* and the said *Upton*; goods so consigned into the hands of the garnishee. — 1 Roll Abr. 551. Carth. 26. 3 Leon. 236. Cro. Eliz. 184. 713. 1 Sid. 327. 1 Roll Rep. 105. Priv. Lond. 197. Dyer 196. 1 Saund. 67, 68. 1 Com. Dig. 423. Dougl. 380.

that

BELLAMY
v.
UPTON.

that *Morley* had signed a bill of lading for the said goods to be delivered to the said *Upton*; or his order, paying first for the same; that the goods were delivered to *Mr. Upton* accordingly, and if the aforesaid thirty pounds are due to *MORLEY pro nautico bonor' præd. onerat' in nave præd. tunc dicunt quod UPTON habuit et habet in manibus suis 30 l. parcell' præd. quinquagint' librarum in prædicto præcepto de SCIRE FACIAS mentionat' ut de denariis dicti defendantis propriis: et si præd. 30 l. non sunt debiti' præd. defend' pro nautico prædict', quod tunc præd. UPTON premuniet' præd. tempore attachment' præd. fact' seu unquam postea bucufq; non habuit, debuit, nec; in manibus suis, detinuit; nec modo habet, æbet, seu in manibus suis detinet præd. 30 l. ut de denariis dicti defend' propriis aut aliquam inde parcel' prout præd. præcepto de SCIRE FACIAS superius supponit, &c.*

[357] * I ARGUED for the plaintiff, before MR. DEE, judge of the sheriffs court.

The general question is, If this *attachment* lies, and if these monies are attachable. To prove the affirmative, it is considerable that the law makes a contract for freight as certain upon a *bill of lading*, as upon a *charter party*. To make this actionable, the duty I agree must be certain or reduceable to a certainty, as here it is by this verdict: the *garnishee* must be the debtor or man chargeable; and the defendant the creditor or person who is to demand or receive it; and here are all three concurring. As to the sum, here the jury finds it certain, that the freight amounts to so much; the jury finds the delivery of the goods to the *garnishee*, according to the bill of lading; though no sum at first agreed on, yet it is a certain debt, as for goods sold, and no price determined and agreed upon; and so it is in case of a *quantum meruit* for service done; and the reason of these cases is, because reduceable to a certainty both in pleading and evidence: here freight is *debitum* in the strictest, largest, and every sense of the word: the *garnishee* was liable for this freight, though the goods had not been delivered according to his order; though the goods were not in his property, yet they must be delivered to him, or his order, and the performance of the *bill of lading* is the foundation and merit for the freight, and that is found to be fulfilled: but here by the *bill of lading*, the property accrues to the *garnishee* in the very goods, and he might maintain an action for not delivering them. Then, though no person be named in the *bill of lading* to whom the freight is payable, yet the law ordains and directs it to the master. It is true, the owners are liable upon miscarriage of the goods, but that is in a remote degree; the first and immediate visible person taken notice of, is the master. So is it for wages, the owners may be sued, but the master is the first liable upon the retainer, and the master being first liable, he is first intitled to the freight; besides, it doth not appear that there were any other owners but the master, and you cannot intend such a thing when it is not found. If no charter party, the master stands liable to the owners for the freight, and consequently he must have remedy against the importer. An attachment

2 Term Rep.
63. 485. 674.

See *Boson v. Sandford*, ante, 29. 101.

attachment lies, though the thing be such as an action on case lies for, as in the case of *Sir Nich. Halse v. Walker*. A lends money to B. to be repaid by B. at the death of his father, and after such death the money is attached, and then an action on the case is brought; and the attachment held a good bar, though the custom be only to attach debts, and the action on * the case, and only damages in it are recoverable, yet good, because debt might have lain for it as well as case. The next case there is *Read v. Hawkins*. A man sells stockings on a particular contract by which the vendee is to give him ten pounds, and if he sell them again before *August*, to pay two pence more; held that the ten pounds is actionable presently, because that is certain, and debt lies for it. Attachments are favoured even against the privilege of attornies, as in *Turbill's case*, 1 *Saund.* 67. and in 1 *Sid.* 362. A debt payable *in futuro* held attachable. In debt for tobacco, &c. held not attachable, because the value did not appear; but if the value of the tobacco had been averred, the debt might have been attached, *Prerie v. Coicott*, 1 *Rolls Abr.* 554. Now though no sum be particularly agreed on, yet debt lies, as for a surgeon, or a carpenter, or an attorney, *Woodhouse v. Bradford*, 2 *Rolls Rep.* 76. *Gro. Jac.* 520. *Rast. Ent.* 187. To put a stronger case; if I pay money to B. to the use of C. either B. may have an action for it, or A. *Hutton* 11. and if debt lies, it is attachable. In the case of *Mollam v. Herne*, 2 *Keb.* 316. 320. in a *quantum meruit*, attachment held pleadable, though other exceptions were, &c. Money in a man's hands may be attached, as if money be left to be kept, or if the garnishee found it, and no contract be to be found, an action of debt lies. Here is a special conclusion, if the money be due to *Morley* for the freight; now that is plainly due to him, no owners being found; especially the goods being found to be delivered according to the bill of lading. Then the question is no more than this: whether an *indebitatus* will lie against the bailee for freight without alledging a particular custom of merchants; and I conceive that it will, even without setting forth a bill of lading: if another retain me to build a house for J. S. and J. S. agrees to it, and I build it; is not J. S. liable to an *indebitatus* for the money? If these goods were carried for the use of *Mr. Upton*, the law raises a promise: suppose it the case of a common carrier, and it were plainer: now the master of a ship is but a common carrier by water, and answerable for loss by theft, as was the case of *Morse v. Sluce* in *HALES's* time. (a) The reason why monies payable upon bills of exchange are not actionable, is only because of their negotiation, because they may be transferred by indorsement, and being by law transferred, it might be of infinite prejudice to third persons who pay the monies upon sight of the bills: here for any thing appears, the master is owner, and consequently only chargeable in case of miscarriage of the goods, and consequently only intitled to the freight: and * therefore this money is well attached, and the plaintiff ought to have his judgment. And money for freight hath often been attached, though never upon debate.

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1 Roll. Abr.
552.

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(a) See 1 Mod. 85.

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MR. UPTON *è contra* argued, that the sum is uncertain; the party to whom payable uncertain; for either owners or masters may sue; and though no owners found, yet "*magister navis*" *ex vi termini* imports only the relation of a governor of a ship as a servant to the proprietor.

On a foreign attachment for 50 l. if the jury find 30 l. in the hands of the garnishee without finding that he has not the residue, it is bad.

So MR. DEE started an objection in the verdict, that there was no finding *non habet* as to the residue of the fifty pounds, attached; and consequently an imperfect verdict, and therefore the plaintiff could not have judgment, but a *venire facias de novo* ought to issue. *Et sic stetit una causa.* See *Rolls 1 Abr.* 802. accordingly,

* Trinity Term,

* [360]

The Fourth of William and Mary,

I N

T H E K I N G ' s B E N C H .

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM DOLBEN, *Knt.*

Sir WILLIAM GREGORY, *Knt.* } *Justices.*

Sir GILES EYRES, *Knt.*

Sir GEORGE TREBY, *Knt. Attorney General.*

Sir JOHN SOMERS, *Knt. Solicitor General.*

Philips against Bury, or the Case of Exeter College.

Case 230.

Hilary Term, 2 William and Mary, Roll. 148.

[A]N EJECTMENT was brought against the defendant *Dr. Bury*, by one *Robert Philips*, who declare upon a demise of *William Painter*, rector of *Exeter College*, and the scholars of the same

EXETER COLLEGE consists of a rector and scholars. A GENERAL VISITOR is appointed to visit by himself or commissary, as often as the college shall request, and without such request, once in five years, with power to deprive the rector, or expel any of the scholars, with this qualification, *si tamen ad deprivationem rectoris, aut expulsionem scholaris alicujus, per episcopum aut ejus commissarium agatur*, then if, he cannot make his innocence appear, he shall be amoved, without further appeal; *dum tamen ad ejus expulsionem*, there shall be the consent of THE RECTOR, and three of the seven senior fellows, provided that if the rector be removed by the visitor's commissary, *etiam consentientibus* four of the senior fellows, he may appeal to the visitor.—If the visitor appoint a commissary to examine the appeal of an expelled scholar, and afterwards, within five years, he, THE VISITOR, appoints a visitation in the chapel, and the rector and scholars shut the door against him, yet he may afterwards proceed to another visitation, and execute his visitatorial powers; and if THE RECTOR, being summoned to appear, continue contumacious, the VISITOR may deprive him for contumacy, although this is not one of the offences mentioned in the statute of the college; for deprivation is incident to his office, and neither the appointment of the commissary, nor the endeavour to visit, are visitations. And it is not necessary when the rector is deprived by the VISITOR, that there should be the consent of the four senior fellows.—The justice of such sentence is not examinable in any court of law; for the founder has made the visitor the sole judge.—S. C. Skin. 447. S. C. Comb. 165. S. C. Holt 715. S. C. 4 Mod. 106. S. C. Ld. Ray. 5. 1 Roll. Abr. 514. 1 Mod. 83. T. Jones 175. 3 Ath. 662. Fitzg. 305. 1 Burr. 158. 200. Annally's Rep. 218. 10 Mod. 48. 2 Will. 206. 1 Bl. Rep. 22. 1 Term Rep. 650. 2 Term Rep. 290. 2 Stra. 797. Cowp. 315.

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college, of a certain messuage called THE RECTORY HOUSE, situate within the parish of *St. Michael*, within the city of *Oxford*, to hold from *Michaelmas*, which was in the second year of their present majesties, until the end and expiration of five years, then next following; that he entered into the premises, and was possessed till the defendant ejected him. To this the defendant pleads that the said messuage at the time of the action brought, and long before, was the freehold and soil of the rector and scholars of *Exeter College* mentioned in the declaration; and that the said defendant long before, and at the time of the supposed ejectment was, and yet is rector of the said college; and by reason thereof the defendant, in right of the rector and scholars of the said college, into the said messuage, with the appurtenants, at the time of the trespass and ejectment alledged in the declaration, did enter; and the said *Robert Philips* did remove, as he lawfully might; and then takes a traverse that the said *William Painter* then was, or is rector of the said college, called *Exeter College*, in the manner and form the plaintiff hath alledged. To this the plaintiff comes and replies, and confesses the said messuage to be the freehold and soil of *Exeter College*; but says further, that at the time of the said trespass and ejectment, the said *William Painter* was, and yet is rector of the said college. Whereupon there is issue joined; and a trial had before the justices in the King's Bench; and thereupon a special verdict is found.

The jury find that *Exeter College* is and was one body politic and corporate, by the name of rector and scholars *collegii Exon' infra universitat' Oxon'*; that by the foundation of the college there were laws and statutes by which they were to be governed; and that the bishop of *Exeter*, for the time being, and no other, at the time of founding the college, was constituted by virtue of the statute concerning that matter hereafter mentioned, ordinary visitor of the same college, *secundum tenorem et effectum statuti eam rem concernent'*; that the bishop of *Exeter*, who now is, is VISITOR according to that statute. Then they find the statute for the election of a rector *prout*, &c.

Then they find the oath required of the rector, That so long as he should remain in that office, he should be true and faithful to the college, and its lands, tenements, possessions ecclesiastical and secular, rights, liberties, and privileges, and all its goods, moveable and immoveable, would keep and defend, and all the statutes, ordinances, and customs of the college he would observe, and endeavour that they should be observed by all scholars, graduates, and undergraduates, &c.; that he would occasion no trouble or grievance to any of the scholars *contra justitiam charitatem et fraternitatem*, but according to the best of his judgment and conscience, he would cause due discipline to be used according to the form of the statutes of the college; that he would maintain and defend all suits for the college, but never begin one wherein any disadvantage or great prejudice may happen to the college, without the deliberate consent of the major part of the fellows; and if any variance happen between him and the scholars, and the same be not ended within ten or twenty days,

days, by the sub-rector, dean, and three senior scholars of the college, that then he would stand to the direction of the chancellor, or in his absence, of the vice-chancellor or his commissary, and his award would faithfully observe, *et si contigerit me in posterum propter mea demerita, seu causas in statut' content' juxta formam statutorum ab officio meo expelli seu alias amoveri, omnibus et singulis juris et facti remediis per quæ vel quæ petere me possim reconciliari vel in integrum restitui circa præmissa quantumcunque aliis probitat' et vitæ merita mihi suffragentur in vim pacti renuncio in his scriptis*, and that he would observe the statutes, according to the plain grammatical sense, &c.

Then they find another statute, *si quis scholarium vel electorum*, he convict of adultery, incontinency, *heresis pertinacis*, wilful homicide, manifest perjury, frequent drunkennels, *alteriusque publicæ turpitudinis*, before the rector, sub-rector, dean, and five other senior scholars, or the major part of them, with the consent of the said rector, he shall be *ipso facto* expelled, *nulla alia monitione præmissa*. And in the same statute (which is intituled *de causis propter quas scholares privari debeant, et de dissentionibus sedandis*) it is farther established, *quod si aliqua discordia ira rixæ aut dissentionis materia (quod absit) in dicto collegio suborta sit, qualitercunque inter quoscunque scholares, aut alios in dicto collegio morantes, nisi sic dissensiones intra unum diem intra se concordent, tunc celerius cautius et melius quo fieri potuit per prædict' rectorem, vel in ejus absentia sub-rectorem, et tres scholares, ex præsentibus in collegio omnino seniores intra biduum sedetur et pacificetur hujusmodi dissensio; si vero ipsi ad eand' sedand' non sufficiant, tum rector (assumpto sibi sub-rectore, decano, et aliis quinque scholaribus omnino senioribus per quos veris' sedari poterit) summarie et de plano eam examinat sicque finis discordiæ, iræ, dissentionis, et jurgii hujusmodi, favore, partialitate, ira, odio, et invidia quibuscunque cessantibus intra tres dies lapsum illius bidui immediate sequentes imponatur: et quicquid rector cum præd' vel major' parte eorundem duxerit ordinandum et agendum per partes discordantes firmiter in virtute eorum juramenti observetur et executioni absque contradictione cujuscunque demandetur: nec liceat alicui de dicto collegio cujuscunque gradus aut status extiterit occasione rixæ jurgii aut dissentionis intra dictum collegium aut extra intra eosdem ortæ vel motæ prosecutionem facere, aut litem aliquam movere vel aliquem impetere, aut ad judicium trahere, coram aliquo iudice extrinseco ecclesiastico vel secular' sed volumus omnino quod hujusmodi jurgia iræ rixæ discordia et dissensiones (quæ per dei gratiam raro aut nunquam contingent) per personas prædict' aliqua ordinatione bona seu concordia terminentur et finientur.*

The jury find, That from the foundation of the college there was, and yet is, *quidam ordo scholiarium, vocat veri et perpetui scholares*, and that by the statutes, every scholar who hath passed his probation year, and is approved to be a true and perpetual scholar, shall take an oath before the rector, or in his absence before the sub-rector, &c. to observe the statutes of the college, and to endeavour that others observe them too, or otherwise to undergo the penalties

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on them inflicted, without contradiction, according to the true form and effect of these statutes: to obey all injunctions, expositions, and constructions by the reverend bishops, successors of the first and original founder, *super dubiis statut' emergentibus ad eisdem episcopos ex consensu rectoris et majoris partis scholarium delat' faciendis*: to be true to the college, neither to do, nor wittingly to suffer to be done, any prejudice, damage, or scandal to the same, to obey, assist, and reverence the rector, sub-rector, &c. and other superiors, scholars in *licitis ac honestis et maxime in eorum conventionibus et in negotiis collegii quatenus statuta jubent aut requirant* effectually to obey all directions and orders of the rector, sub-rector, &c. to maintain and defend the rights and liberties, the honesty and good fame of the college, and its scholars, &c. *Item si contingat me posthac per rectorem aut in hujusmodi rebus habentes interesse corrigi, et puniri, aut a dicti collegii sustentatione ejici et expelli, excludi, privari, vel amoveri præter mea forsan demerita, ipsum rectorem seu alias personas seu eorum aliquem, occasione expulsionis vel correctionis, hujusmodi nunquam prosequar', molesto, vel inquietabo, per me alium vel alios, seu ab aliis prosequi vel molestari seu inquietari ea de causa quantum in me fuerit permittam: sed sponte simpliciter vel absolute, omni actioni, contra rectorem aut alios dicti collegii scholares quomodo dolibet appellationi et querelæ in ea parte faciendis, ac quorumcunque literar' impetrationi præcibus principum, prælatorum, procerum, magnatum, et aliorum quorumcunque quibus poss' ad jus titulum et possessionem vindicandum reconciliari, ac quibuscunque juris et facti remediis per quæ me petere possem integrum restitui, quantumcunque alias mihi probitatis et vitæ merita suffragantur, in vim pacti renuntio*: to be just and impartial in election of scholars, not to reveal the secrets, &c. not to desert the college to be of another, without license, &c.

The jury further find, That according to the statutes there are probationary scholars, who are to be such for a year, before they be admitted to be true and perpetual scholars, and that every one chosen in for a probationer, shall swear that he cannot certainly expend above four marks *per annum*; to be true to the college, and not to reveal secrets to its scandal, prejudice, or danger; not to make or procure any conventicles, conspiracies, or contracts against the ordinances and statutes of the college, or the honour of the college or the rector, &c. to promote peace there, *et si contingat me (quod absit) juxta formam et exigentiam statutor' a prædicti collegio expelli seu amoveri per rectorem et alias person' in hujusmodi expulsionem interesse habentes, &c.* in like manner as the perpetual scholars swear.

Then the jury find the statute *de visitatione*, reciting how prone mankind is to evil, and time changeth the best things, and that it is impossible to make laws, but by misconstruction, fraud, or other practice may be dissolved, that he confided in the bishops of Exeter his successors (*quos dicti collegii patronos et visitatores relinquimus*) that those who are brought thither through fervent charity, being inflamed with christian faith, might watch to the preserving

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preserving that nursery, that the statutes and ordinances of the college might be studiously observed, virtue and learning be nourished, their possessions and goods, spiritual and temporal, may flourish, their rights, liberties, and privileges may be defended: *Ea de causa liceat domino episcopo Exon' qui pro tempore fuerit, et nulli alii nec aliis quoties per rectorem dicti collegii et in ejus absentia sub-rectorem et quatuor alios ad minus ex septem maxime senioribus scholaribus fuerit requisitus, necnon absque requisitione ulla de quinquennio in quinquennium semel ad dictum collegium per se vel suum commissar' quem duxerit deputandum, libere accedere; cui quidem reverendo*—He gives full power upon all articles in the statutes contained, and other articles concerning the estates, honours, or profits of the college, to interrogate and examine the rector, scholars, and elect, and to compel them by oath, and censures if need be, to say the truth, and all crimes and offences of the said college whatsoever, *commissa et in ea visitatione comperta*, according to the quality of the offence to punish and reform, and to do all things requisite *quoad eorum correctionem et reformationem etiamsi ad deprivationem seu amotionem rectoris sub-rectoris aut alterius cujusquam ab administratione sua vel officio sive ad amotionem alicujus scholaris vel electi ab eodem collegio, statut' et ordinationibus id exigentibus, procedere contingat: stat' insuper*, that none in dictis visitationibus in dicto collegio faciend' contra rectorem sub-rectorem aut aliquem alium ipsius collegii quemcunque dicat deponat seu denunciat nisi quod verum crediderit seu de quo publica vox vel fama laboraverit contra eundem in virtute juramenti ab eo prius collegii prestiti: *ordinantes præterea ut dominus episcopus Exon cum in persona propria visitare aut præmiss' facere dignatur, rector et duo scholares ex præsentibus maxime senioribus unam in collegio refectionem quadraginta solidor' expensas non excedentem eidem episcopo humiliter et reverenter offerent. Commissario autem cum præmissa fecerit duas refectiones in collegio vel viginti solidos per manus rectoris de bonis collegii persolvi concedimus pro omnibus laboribus et expensis in hanc causam tam in itinere quam in universitate tempore hujus visitationis. Itaque dominus episcopus quadragint' solid' commissarius vero viginti solid' in uno et eodem anno pro actu visitationis ad sumptus collegii non excedat; nec inceptam aliquam visitationem ultra duos dies proxime sequentes, aut ex causis urgentissimis et rarissimis ultra tres dies prorogari aut continuari ullo pacto volumus sed laps' et acto illo biduo et quando de causis prædict' ulterius prorogatur triduo transacto ea ipsa visitatio illa pro terminata et dissoluta habeatur.*

Et si quæ in ea comperirent corrigenda et reformanda quæ brevitate temporis corrigere et reformari non potuerint, ea rectori in scriptis tradat, qui ea omnia secundum formam et exigentiam statutorum sine dilatione quantum in eo erit corrigere et reformare tenebitur sub pœna contemptus: then in the name of Jesus, and as they will answer it at the last tribunal, that neither for fear, hatred, favour, ill-will, vel prece, vel pretio, they do or neglect to do any of the premises, &c.

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Statuimus præterea, ut rector subrector scholares aut alius quispiam cujuscunque sortis dicti collegii super excessibus vel delictis in visitationibus et inquisitionibus per dictum episcopum Exon vel ejus commissarium ut permittitur faciendis accusatus vel detectus copiam compertorum vel detectorum hujusmodi tradidi aut ostendi aut nomina detegentium non ostendantur: sed sup' iisdem compertis aut detectis statim coram episcopo vel ejus commissario personaliter respondeat ac correctionem debitam subeat pro eisdem secunda tenor' statut' cessantibus quibuscunque provocationibus appellationibus querelis et aliis juris et facti remediis per quæ ipse correctio et punitio deferri seu impediri valeat.

Si tamen ad privationem aut inhabilitatem rectoris aut expulsionem scholaris alicujus per episcopum aut ejus commissarium agatur: tum ostendantur ei delicta, quibus si non potuerit rationabiliter et honeste respondere suamque innocentiam probabiliter ostendere, et sese super objectis juste purgare, amoveatur sine appellatione aut ulteriori remedio, dummodo ad ejus expulsionem concurrat consensus rectoris et trium ex septem maxime senioribus scholaribus tunc in universitate presentibus; sine quorum consensu irrita sit hujusmodi expulsio et nulla ipso facto: et in sup' si contra rectorem ad amotionem ab officio per hujusmodi domini episcopi commissarium, etiam consentientibus quatuor ex septem maxime senioribus supradictis procedat non negamus ei omnes exceptiones defensiones justas et honestas, apud ipsum domum episcopum Exon dummodo ulterius non appellat, non obstante hac ordinatione prædicta aut aliis quibuscunque.

The jury further find, that in another statute, propter quas causas rector officio privari debet. It is thus, Cum bono providoque rectore nihil sit utilius; et imprudenti, inepto, indigno, penitus inhabili, criminoso nihil sit detestabilius: statuimus ut rector quicunque propter terrarum, tenementorum, reddituum, possessionum spiritualium aut temporalium sua culpa diminutionem seu alienationem, vel propter detractionem ablationem alienationem illicitam bonorum et rerum ipsius collegii, infamiam, adulterium incontinentiamque negligentiam intolerabilem, heresin pertinacem homicidium voluntarium, perjurium manifestum, crebram ebrietatem, et propter longiorem absentiam a collegio quam statuta permittunt, vel procuracionem sui sibi officii per largitiones inhonestas datas dandas vel promissas, vel quacunque via aut modo illicito, et propter usuram, simoniam, aliamve causam ipsum rectorem reddentem criminaliter irregularem vel aliter penitus inhabilem, necnon propter infirmitatem infectivam et contagiosam perpetuam, cujus occasione non poterit absque scandalo officium hujusmodi exercere, ab eo penitus amoveatur, ad cujus amotionem hoc modo procedatur, viz. ut statim vel saltem inter quindecim dies postquam aliquid præmissorum commiserit vel in eorum aliquod inciderit, primo per subrectorem, assistentibus ei quinque scholaribus maxime senioribus dicti collegii moveatur rector eique bonis rationibus suadeant ad voluntarie cedendum officio: quod si sponte inter triduum cedere noluerit, tunc intra octo dies post hujusmodi monitionem subrectoris assensu et testimonio omnium perpetuorum scholarium dicti collegii vel saltem majoris partis eorundem, denunciabit domino episcopo Exon qui pro tempore fuerit, per duos ipsius collegii scholares omnino seniores, cum litteris ali-

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quo sigillo authentico, ac signo & subscriptione alicujus notarii publici signatis, vel saltem loco sigilli authenticici, subscriptione subreſtoris, ut prefertur, & majoris partis ſcholarium ac notarii publici ſigno communitis cauſas defectus crimina exceſſus vel enormia reſtoris continenſibus, proviſo quod omnes hujusmodi atteſtantes, ac teſtimonium perhibentes, prius taſtis ſacroſanctis Dei evangeliis coram ſubreſtore, ipſo primum id coram illis preſentante, ac deinde a ſingulis eorum id exigente, jurabunt, quod non per invidiam, malitiam odium vel timorem, nor for love nor honour of any other to be promoted to the place, nor for emulation nor envy, or by conſpiracy or the procuration of any other they did teſtify it, but merely from a good zeal and love for the college, and the good eſtate thereof: that the biſhop or his vicar, de cauſis criminibus exceſſibus et defectibus contra reſtorem propoſitis ſumam & de plano et extra ſtrepitum judicialeſ cognoscat, and if by ſufficient proof he find the accuſation true, he ſhall immediately remove him from his office and adminiſtration, and enjoin the ſcholars to proceed to the election of a new reſtor, according to the form of the ſtatute aforeſaid: Ceſſantibus appellacionibus—querelis aut cujuſcunque alterius juris & facti remediis quibus hujusmodi amotio valeat impediri aut differri, quæ omnia irrita eſſe volumus ſtatuiſmus & decreviſmus ipſo facto.

The jury find further, that queen *Elizabeth*, on the firſt of *March* in the eighth year of her reign, makes this houſe which was before a hall, to be a college, and confirms the ſtatutes, and conſtitutes them a body corporate, and that one Sir *William Petre*, being willing to ſupply the wants of the college, makes addition to the revenue, and to ſome defective ſtatutes, &c.

Then they find that before the time of the demife in the declaration, viz. 16 *Octob.* 1 *Will. and Mary*, one *James Colmer, A. M.* was convicted before the reſtor, ſub-reſtor, and five ſeniors, of incontinency, with one *Ann Sparrow*, and therefore was expelled; that he appealed to the biſhop of *Exeter*; that 21ſt of *February* 1689, he made his commiſſion to Dr. *Masters*, which commiſſion is found in *hæc verba*, reciting that it is complained by C. that he was unjuſtly expelled, and therefore appoints Dr. *Masters* to hear and determine the ſame: that the commiſſary proceeds to the execution of that commiſſion and 22^o *Martii*, he comes to the college and ſits in the chapel with a notary public, and *Colmer* appears, and the reſtor and the reſt did not; then he adjourns to the hall, and ſummons all the parties to attend there, and there Dr. *Bury* made and exhibited a proteſtation in writing under their hands, ſetting forth the oath of a fellow not to appeal and proteſt againſt his authority, to examine it; thereupon, the doctör proceeds and examines the fact *ex parte*, and reverſes the ſentence, and reſtores *Colmer*, viz. 25 *March*, becauſe the proceſs was not tranſmitted.

Then they find that the 16th of *May*, the biſhop iſſued his citation to the reſtor, or ſub-reſtor, for a general viſitation, to be held the 16th of *June*, in the chapel of the college; and accordingly the 16th of *June*, the biſhop comes to the college, and to the door
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of the chapel, which was shut up; and that the porter was subject to the government of the rector, and bound to obey his commands, in shutting or opening the doors; and certain of the scholars did then offer *in area collegii*, a certain writing under their hands, protesting against the visitation, as within time, by reason of Dr. Masters's visitation: this is refused by the bishop: the bishop then administered an oath to *Webber*, of the service of citation; and then he called over the names of the rector and scholars who appeared not; and not being admitted into the chapel, he departed.

Then upon the 21st of *July*, he summons a visitation upon the 24th of *July*, and the 23d of *July*, the rector, &c. protested against the intended visitation, insisting on their statutes, which by oath they are bound to observe, and this under their common seal. Then the bishop upon the 24th of *July*, receives the protestation, *quatenus de jure*; then they departed, refusing to agree to his visitation; ten of the fellows appeared, and submitted; the rest were pronounced *contumacious* for not appearing: then he administered several interrogatories, to discover matter of accusation against the rector and fellows. In the afternoon the absentees were called again, and declared in contempt, and the fellows suspended, and adjourned to the 25th; and then Dr. *Herne* was deprived for having a living inconsistent with his fellowship; Dr. *Bury* is pronounced *contumacious*, *sed de pœna in eum infligend' duxit deliberand'*: then the 24th he calls for the act, *actum quendam coram eo decimo sexto die Julii ult' elapso die alias statuto pro visitatione hujus collegii expedit' eundemque actum pro parte process' hujus negotii visitationis haberi decrevit*. Then he adjourns to the 26th, and then he deprives Dr. *Bury* for contumacy, with the consent of four of the seven senior fellows not suspended; twelve having been suspended. And they find further, that the four fellows which subscribed the sentence of deprivation, were not of the senior fellows, unless by the deprivation of Dr. *Herne*, and the suspension of *George Vernon*, *Thomas Lethbridge*, *Benjamin Archer*, *Samuel Adams*, and *Philip Thorne*; all which six, half the number of the suspended, were seniors to the consenting scholars.

Then they find that after this sentence, *Painter* was elected into the rectorship, *concurrentibus omnibus requisitis; si prædict' officium rectoris eo tempore fuit vacans*; and that Dr. *Bury*, 1 *June*, anno Jac. 2. *et semper postea usque sententiam prædict'*: *si sententia in contrar' non valeat semper postea fuit et ad hæc est verus et legitimus rector collegii prædict'*.

That *William Painter* as rector, and the scholars of the said college did make the demise in the declaration, and thereon the plaintiff entered, and Dr. *Bury* enters on him, and holds, and yet doth hold him out, *modo et forma prout in nar'*, &c. *sed utrum super totam materiam prædict' locus rectoris per privation' prædictam præd' Arthuri legitime vacavit nec ne* the jury are ignorant, *et si per inde locus*

locus prædict legitime vacavit tunc pro quærent' et si non, tunc pro defendent'.]

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MR. HARRINGTON for the plaintiff, made several queries.

FIRST, Whether there was a vacancy at the time of the election of *Mr. Painter*.

SECONDLY, Whether the *bishop of Exeter*, at the time when he deprived *Dr. Berry*, were a competent judge. Concerning a visitor's power, he cited *Littleton* 139. *Dyer* 209. *Sid.* 71. *Co. Lit.* 244. 9 *Hen.* 6. pl. 32. 9 *Edw.* 4. pl. 24. That the visitor may deprive the head, *Bro. titl. Depositions*, 217. 2 *Inst.* 225. *Styles* 457. *Yelv.* 61, 62. The rector's place is founded on the will of the donor, and he takes *sub modo illo*: they are punishable for breach of that will, 3 *Bulst.* 189. *Poph.* 154. *Rolls Abridgment*, titl. *Restitution.* 10 *Rep.* 5.

THIRDLY, Whether the statutes of *Exeter College* did restrain the visitor from thus depriving. The *bishops of Exeter* are made *patroni colleg'*, N. B. 42, 93, 94. Whosoever is settled *patronus*, is in *loco fundatoris*, 6 *Hen.* 7. 14. He is visitor, *et ordinarius visitator*, i. e. a continued ordinary judge. Now an ordinary judge hath immediate jurisdiction *de mero jure*, *Co. Lit.* 344. 2 *Rolls Abr.* 220. *Davis's Rep.* 3. *Ordinarius est qui habet propriam jur'*, his power is given him with the addition of negative words, exclusive of all others. Besides it must be agreed, that eleemosinary corporations are necessarily at all times subject to some visitation or other, 10 *Co.* 31 *Bro. Affiz.* 55. *Summa Angelica tit' Hospitalis*; *prescriptio tollens visitationem non valet*. Where there is a local visitor, no other hath jurisdiction, * *Mod. Rep.* 83. *Prynn on 4th Inst.* 228. * [361] *Duke, on Charitable Uses*, 69.

OBJECTION. That the visitation is to be but *semel in quinquennio*, it is limited. ANSWER, That the end of the limitation is only for the benefit of a *sportulage*, that that charge shall be no oftener, but by the common law he may, if he see necessity, visit oftener. The ordinary jurisdiction of receiving appeals, and determining of matters delegated to him, is not hereby restrained. This is the reason why *mandamus's* have always been denied, because they may at any time appeal, *Goddard v. Hyde*, 2 *Rushw.* Here the jury hath expressly found, that no other hath visitorial power there, but the *bishop*. The commission of appeals was not a visitation, nor a determination of that power; visitations and appeals are different things and powers, *Dyer* 377. A void act tolls not a right.

FOURTHLY, Whether the concurrence of any other person was necessary to this deprivation: now these senior fellows were suspended, and that suspension takes away their claim to either power or profit, *Latch.* 236. So that the next senior fellow's concurrence is sufficient.

Then

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Then FIFTHLY for the sentence. It was but adequate to the crime furnished, and if the visitor had a jurisdiction, then the truth of that furnise is not examinable here, 9 *Edw.* 4. pl. 24. 8 *Affize*, 9. 29. 31. 7 *Co.* 70. 12 *Co.* 42. *Davis* 47.

see *Rex v. St. Catherine's Hall*,
Cambridge,
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* [362]

MR. SOLICITOR TREVOR *e contra*. The first question is, Whether this sentence be peremptory; and, for that, it is not so peremptory but this court may examine if regular. (a) Particular authorities must be pursued, if otherwise, their acts are void, 10 *Co. Mar-shalsea*, 22 *Edw.* 4. pl. 33. The rector hath a right to his place as a freehold, 11 *Co.* 93. *Bagg's case*, 8 *Co.* Dr. *Bonham's case* upon the statute of bankrupts, in an action the party may traverse the bankruptcy, because he hath no other remedy. So on the statute of sewers who have power to proceed, and act according to discretion. The proceedings of a visitor are extra judicial; the visitor hath no power, but by the will of the founder; his authority is not judicial, it is only a ministerial power. Where the ordinary is visitor himself, of a spiritual foundation, or where the king makes a spiritual foundation, there the visitor is judge; but a founder of a lay foundation is not a judge, and his acts are subject to the determination of the courts of justice here, *Dyer* 209. 4 *Inst.* 390. 340. 13 *Co.* 70. 8 *Affize*, 29. 31. 1 *Inst.* 282. 8 *Edw.* 3. 70. In cases where the visitor makes the original sentence, it must be examinable there, because no appeal in case of spiritual * foundations. It is true in *Appleford's case*, and those other cases, they were expelled by the heads, or masters of colleges, and so they had an appeal to the visitors; but here is none.

SECONDLY, At this time the visitor had no power of visiting according to the institution and statutes of the college, and *Dr. Master* had visited within the five years, for it is but once in five years that he can visit, and though there are no negative words to exclude any other visitation, yet these are the words that make him visitor, and that is but once in five years: the act of *Dr. Master*, was a visitation, for there was no power to receive or examine the appeal but as visitor *de quinquennio in quinquennium semel*; the visitor hath no particular express power given him to hold appeals but in one case only, so that this power of taking appeals in any other, must be as visitor.

THIRDLY, Then that which they call an intentional visitation was one, *i. e.* The administering of the oath was an act of visitation, for his doing more or less at a visitation is not of its essence, for he is judge of that, to do what he pleases.

FOURTHLY, Then further, here is not a sufficient cause for a deprivation; the fact called "contumacy," is not so; and that you will examine for the reasons before offered, the doctor's humbly offering his opinion, is not obstinacy, or contumacy.

(a) See the case of the King v. the Bishop of Ely, 2 Term Rep. 290.

FIFTHLY,

Trinity Term, 4 William and Mary, in B. R.

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FIFTHLY, Then another question is, whether admitting it were contumacy, if the bishop can deprive him. This is none of the offences mentioned in the statute for which the rector may be deprived. In the statute *de visitatione*, which gives a power by general words, it refers to the other statutes concerning the matter or cause.

SIXTHLY, Then the consent of the senior fellows is requisite, which the bishop here had not. The bishop hath not power to deprive the rector, but upon complaint from the fellows and the college. If he may deprive for any cause not mentioned in the statute, he may as well deprive without any cause at all.

HOLT Chief Justice. Suppose the visitor had deprived him for murder, whereof he is not convicted. There is a great difference between a lay and a spiritual foundation, but a visitatorial power is incident to every such society, and a visitor is the founder's own creature, and he has made him sole judge. In *Appleford's case* it was held that the visitor's sentence was a judgment; and that it is a judicial act, can be no great question.

Adjournatur to be argued again.

[It was argued again by SIR THOMAS POWIS for the plaintiff, and by BLENCOE for the defendant; and in *Trinity Term*, 6 *William and Mary*, the judges gave their opinions *seriatim*. HOLT Chief Justice (b) made two questions. FIRST, Whether or no by the constitution of this college, the bishop of Exeter had power in this case to give sentence. SECONDLY, Supposing he had such a power, whether the justice of this sentence be examinable in this court; and he was of opinion, that the bishop had power by the constitution of the college to give a sentence; and having that power, the justice of that sentence is not to be examined in a court of law upon an action. But S. EYRES, G. EYRES, and GREGORY Justices (c), being of a contrary opinion, judgment was given for the defendant.

A WRIT OF ERROR was afterwards brought in parliament.

FOR THE PLAINTIFF IN ERROR. It was argued (d), that this judgment was illegal; and the general question was, Whether this sentence of deprivation, thus given by the visitor against Dr. Bury, did make the rectorship void as to him, and so consequently gave a title to the lessor of the plaintiff. But upon this record the questions were two: 1. Whether or no by the constitution of this college, the bishop had a power in this case to give a sentence. 2. Supposing that he had such a power, whether the justice of that sentence were examinable in *Westminster-hall* upon that action?

(b) See HOLT's argument in this case taken from his own MSS. 2 Term Rep. 346.

(c) See the arguments of these judges, Skin. 447. 4 Mod. 120.

(d) See SKINNER's argument for Dr. Bury, in the house of lords, Skin. 491.

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Burr. 158.
Will. 206.

Mod. 83.

Roll. Abr.
29.

And 1. it was argued, That the bishop had such a power to give a sentence; and it was agreed that he could make his visitation but once in five years, unless he be called by the request of the college; and if he comes uncalled within the five years, his visitation would be void: but yet the visitation of the 24th of *July* was a good visitation, and consequently the sentence upon it is good; that there was no colour to make Dr. *Masters's* coming in *March* to examine *Colmer's* appeal upon the visitor's commission, to be a visitation; and that because it was a commission upon a particular complaint, made by a single expelled fellow, for a particular wrong and injury supposed to be done to him, and not a general authority to exercise the visitatorial power, which is to inquire into all abuses, &c. *Colmer* complains that he was expelled without just cause, and seeks to the visitor, for redress, they having expelled him for an offence, of which he thought himself innocent; and the visitor sends his commissary to examine this particular matter. Then it was urged, that though a visitor be restrained by the constitutions of the college, from visiting *ex officio*, but once in five years; yet as a visitor, he had a constant standing authority at all times to hear the complaints, and redress the grievances of the particular members; and that is part of the proper office of a visitor to determine particular differences between the members, and thus is *Littleton's Text, sect. 136.* that complaint may be made to the ordinary or visitor, praying him that he will lay some correction and punishment for the same, and that such default be no more made, &c. And the ordinary or visitor of right ought to do this, &c. and so was it held in *Appleford's* case in the court of *King's Bench*, who was expelled upon a like occasion as *Colmer* was; he appealed to the bishop of *Winton*, who was visitor, and he confirmed the expulsion, and held to be good upon the appeal; for the hearing of appeals is a standing, fixed, constant jurisdiction. Visiting is one act or exercise of his power, in which he is limited as to time; but redressing of grievances is another, and his proper office and business at all times. It is the case of all the bishops of *England*, they can visit by law but once in three years, but their courts are always open to hear complaints and determine appeals; so that here, though but one visitation can be in five years without request, yet the power and authority to hear and examine any difference between the members, and to relieve against any particular injury, that is continual, and not limited.

Then it was argued, That though what was done upon the sixteenth of *June*, was with an intention to visit, yet being denied to enter the chapel, where the visitation was appointed to be held, it was none; and his calling over the names, was only to know who hindered the visiting; and his making an act of it afterwards, or administering an oath at the time, can never be called one; though it hath been below said to be a tacking that of *June* to that of *July*: but that cannot be, for then it continued much longer than was intended; nay, much longer than it can

can by the statutes of the college, for that is to cease in three days.

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It turns rather the other way; having been hindered in *June*, he makes an act of it in *July*, in order to call them to an account for it, as for a contumacy, and to bring them to judgment at his visitation: it was no more than taking an affidavit of the service of a citation.

The appointment of a visitation in the hall was occasioned by the obstruction met with at the chapel; and it would be a very strange construction, that when he designed a visitation, and was hindered, that the hinderance and his inquiry about it should be called a visitation; and a former contumacy in opposing an intended visitation, should prevent their being subject to an actual true one.

Then it was argued, That there was no necessity that there should be the consent of the four senior fellows to the deprivation of the rector; and by one of the council it was owned, that if such consent had been necessary, the sentence had been a nullity: but as this statute is framed, it was argued, that the bishop might deprive though they did not concur, for these reasons:

1. By the statutes, the bishop for the time being, is made the ordinary visitor of *Exeter* college, and that where any one is visitor of a college, he hath full and ample authority to deprive or amove any member of the college *quatenus* visitor. 2. There is an express power given to the bishop to proceed to the deprivation of the rector, or the expulsion of a scholar; and this in his visitation. And 3. The qualifying words do not restrain it to be with the consent of the four fellows; the word is *deprivatio* as to the rector, and *expulsio* as to the scholar; though they are synonymous as to real sense, yet by this statute they are differently applied: Then it says, *If the bishop do proceed, &c.* that only relates to the case of a scholar, because the word there used is *expulsio*, which is never applied but to the amotion of a scholar; and it is impossible to relate to the rector, for then he must consent to his own deprivation, for his particular consent is mentioned and required, and that is not to be expected: and in this case, the consent of the senior fellows, without that of the rector, is not sufficient. Co. Lit. 96.

But then the subsequent words are, *That if the rector be deprived by the bishop's commissary, with the consent of the senior fellows, he may appeal to the bishop*: it is true the rector hath that liberty, if the commissary do deprive him; but there are no words that do abridge the bishop's own power. The commissary's power is restrained by those words, *to have the consent, &c.* but the bishop's own power hath no such qualification.

It is objected, That it is unreasonable to imagine a greater power

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er in *the visitor*, over *the rector*, than over *the scholars*. But the question is not, what was fit and reasonable for *the founder* to have done? but to consider, upon perusal of the statutes, what he hath done? Suppose he doth give such an absolute authority, it is what he had over the thing granted; he might have reserved to himself a power of revocation, or what other power he thought fit; and by the same reason he might give the like to a visitor of his appointment; and having done so, it must be supposed that he had some reasons for so doing. The rector hath a privilege, not to be deprived without the benefit of appeal, if it were by the commissary: the scholars have no appeal. He might think fit to trust the rector with his visitor the bishop, as supposing more care would be taken by him of the head of the college, than of inferior members.

See St. John's
College, Cam-
bridge v. Tod-
dington.
1 Burr. 158.

But the question is not, what reason induced the founder to make those appointments? he was master of his own charity, and might qualify it as he pleased; and he hath given it under this qualification, that the bishop is made visitor, and might deprive the rector, as he hath done, according to the statutes and constitutions of this college.

Dyer 209.
3 Mod. 265.
1 Bl. Rep. 22.
25.

Then 2. The sufficiency of the cause of this deprivation is never to be called in question, nor any inquiry to be made in *Westminster-hall* into the reasons or causes of such deprivation, if the sentence be given by him that is the proper visitor, created so by the founder, or by the law.

Rex v. the
Vice-chancellor
of Cambridge.
3 Burr. 1647.

It was urged, that there are in law two sorts of corporations aggregate, consisting of many persons; such as are for public government, and such as are for private charity. Those that are for public government of a city, town, mystery, or the like, being of public concern are to be governed according to the laws of the land, and to be regulated and reformed by the justice of *Westminster-hall*; of these there are no private founders, and consequently no particular visitors: there are no patrons of these; they only subsist by virtue of the king's letters patents, or custom and usage, which supposes letters patents, and are supported and ruled by the methods of law: therefore, if a corporation be made for the public government of a town or city, and there is no provision in the charter how the succession shall be, the law supplies the defect of that constitution, and says it shall be by election, as mayor, aldermen, and common council-men, and the like; and so is 1 *Rolls Abridg.* 513.

See 3 Term
Rep. 189.
See the statute
11 Geo. 1. c. 4.

1 Eq. Caf. 130.
8 Aff. 29.
6 Com. Dig.
"Visitor"
(A. 4.)

But private and particular corporations for charity, founded and endowed by private persons, are subject to the particular government of those who erect them: therefore, if there be no visitor appointed; in all such cases of eleemosynary corporations, the law doth appoint the founder and his heirs to be visitors: they are patrons, and not to be guided by the common known laws and rules of the kingdom;

dom; but such corporations are as to their own affairs to be governed by the particular laws and constitutions assigned them by the founder.

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Though some have said, that the common law doth not appoint any visitation or visitor at all, yet it is plain, that it doth in defect of a particular appointment; it makes the founder visitor; and it is not at his pleasure whether there shall be a visitor or not, but if he is silent during his life-time, the right will descend to his heirs, and so is *Yelv. and Cro. Jac.* where it is admitted on all hands, that the founder is patron, and as patron, is visitor, if no particular visitor be assigned, 8 *Edw.* 7. 8. 8 *Affize*, 29. 9 *Hen.* 6. 33. *Co. Lit.* 96. so that patronage and visitation are necessary consequents, one upon another; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical, it is an appointment of the law; it arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, *i. e.* an authority to inspect their actions, and regulate their behaviour as he pleases; for it is not fit, that the members who are endowed, and who have the charity bestowed upon them, should be left to themselves, but they ought to pursue the intent and designs of him that bestowed it upon them.

4 Mod. 124.
Noy 91.
2 Roll. 230.
10 Co. 31.
2 Inst. 68.

2 Roll. Abr.
231.

Where the poor are not incorporated, *i. e.* they who are to have the charity, but trustees are appointed, there is no visitatorial power, because the interest of the revenue is not vested in them; but when they who are to enjoy the benefit of the gift are incorporated, there, to prevent all perverting of the charity, the law doth not establish a visitatorial power; and it being a creature of the founders, it is reasonable that he and his heirs should have that power, unless it were devolved elsewhere.

1 Eq. Cases : 80.

It was further argued, that in our old books "deprived by patron," and "deprived by visitor" are all one, for this authority to visit is a benefit that naturally springs out of the foundation, and it was in his power, if he pleased, to transfer it to another, and where he hath done so, the other will have the same right and authority as the founder had.

There is no manner of difference between an hospital and a college, except only in degree; an hospital is for those that are poor and mean, or sick, &c. a college is for another sort of persons, and to another intent; the former is to maintain and support them; this is to educate them in learning, who have not otherwise wherewithal to do it: but still it is much within the same reason of that of an hospital; and if, in an hospital, the master and poor are incorporated, it is a college having a common seal to act by, though it bear not that name, because it is of an inferior de-

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gree ; and in both cases there must be a visitor, as both are eleemosynary.

A visitor being then of necessity created by the law (as 8 *Edw.* 3. 69, 70. Every hospital is visitable; if lay by the patron; if spiritual by the ordinary) he is to judge, and he may expel; and as it is 8 *Affize*, 29, 30. he may deprive. The only question is, if he were visitor at this time; for it hath been and must be agreed on all hands, that *quatenus visitor*, he might deprive. If he be a visitor as ordinary, there lies an appeal from his deprivation, but if as patron, there is none; and then that deprivation, whether right or not, must stand.

2 Term Rep.
292.

As to the objection, that it is not the sentence of a court, and therefore not conclusive; it is not material whether it be a court or not, but the question is, if he had jurisdiction and consue of the person and thing; and if he had, then his sentence holds: and where the founder hath not thought fit to direct an appeal, no appeal lies, nay not to the common law courts; the founder having put all under the judgment of the visitor, it must continue so; he might have ordered it, that the rector should continue only during the pleasure of the visitor, but now he hath left it to his wisdom according to the statutes.

3 Atk. 662.
1 Ves. 78.
2 Ves. 327.

He is a judge not only in particular by appointment, but as he is constituted a visitor in general; then in pleading of a sentence of deprivation, there is no necessity of shewing the cause, the cause is not traversable even in a visitation, so is *Rastall*, 1. 11 *Hen.* 7. 27. 7 *Rep. Kenne's case.* 9 *Edw.* 4. 24.

Suppose this rectory had been a sole corporation, and not part of a corporation aggregate, as it is, consisting of rector and scholars, and Dr. Bury had brought an assize, and this deprivation had been pleaded, it had been good to have said that the *visitor certis de causis ipsum adinde moventibus*, had deprived him: every thing that is traversable must be expressed with certainty, but the cause need not be so in this case.

Now it is strange, that pleading a sentence without a cause, should be good, and the finding of a sentence in like manner in a special verdict should not be good: if in pleading it be not traversable, it is the strongest argument, that the cause is not to be enquired into; the having no appeal doth not lessen the validity of the sentence, it doth only shew the rector's place, not to be so certain and durable, as in other cases they are, where appeals are allowed.

The case of *Caudry*, in the high commission court, is as strong; a sentence of deprivation, no appeal, and the sentence found and no cause shewn, yet held good. It is no answer to say, that that was by the ecclesiastical law; how is it the ecclesiastical law, that a man shall be concluded by one sentence without appeal; no, it was, because it was by a court that had jurisdiction; and the sentence was
not

not the weaker, or the cause of it more inquirable, because there is no appeal.

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It was by the ecclesiastical constitution, that the commissioners had that power, but that was established by the law of the land, and so is the visitatorial power, the one authority is as much derived from the law as the other.

2 Roll. Rep.
230.

In the case of *Bird v. Smith, Moore* 781. deprivation for not conforming to THE CANONS, was held good in like manner.

As to the case of *Couney* in *Dyer* 209. and that in *Bagges's case*, 11 Co. 99, they are the same, as to this matter, though in two books; an assize because no appeal: He quotes books for it, but upon a perusal they will not warrant the distinction; for the party is as much concluded in the one case as in the other: it is reasonable to suspect that case not to be law, because that is impracticable, which it is brought to prove. The head of a college cannot maintain an assize for his office of headship: he hath not such an estate as will maintain that writ, therefore to give that instance against us, is hard; the rector hath no such sole seisin; the whole body of the college have an interest therein; he hath no title to the money in his own right, till by consent they are distributed; and after such distribution, it is not the rector's money, but Dr. Bury's; he is the only visible head of the body in deed, but has no single right.

In *Appleford's case*, the like argument was drawn from this case for a *mandamus*, and insisted that he might have an *assize*, but said by the LORD HALE, that that was impossible; and in truth, there is no difference between this case and that of a *mandamus*, there was a return that he was removed, *pro crimine enormi*, and appealed to the bishop of *Winton*, who confirmed the amotion, and the particular cause was not at all returned, and held good; because there was a local visitor, who had given a sentence, and all parties were concluded by it, the same being done by the power of that government, which the founder had thought fit to put them under.

1 Mod. 81.

Now it was argued from hence, that this was an express case, if the cause of the deprivation be examinable in the courts of common law, why not upon a *mandamus* as well as in an ejectment. LORD HALE in that case of *Appleford*, took it for clear law, that the sentence was as binding as a judgment in an *assize*: he is made a judge, and his person particularly designed by the founder, but he hath his authority from the law; and since the founder hath trusted the matter to his discretion, it is not to be suspected that he hath done, or will do otherwise than right.



4 Mod. 112.
1 Bl. Rep. 22.
25. 52. 71. 82.
1 Will. 266.

Then in the next place it was argued, that there doth not appear any injustice in the sentence, and consequently it ought to be

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presumed just; credence is to be given to a person that exercises judicial power, if he keep within his jurisdiction. The law hath respect not only to courts of record, and judicial proceedings in them; but even to all other proceedings, where the person that gives his judgment or sentence, hath a judicial authority; and here is no fault found in the sentence; the jury have not so much as found the matter and ground of it to be untrue in fact, or insufficient in law.

Then it was urged, that the cause of deprivation here was just, it being for contumacy. If the bishop had power to visit in *June*, as he had, and was hindered by their shutting the doors, whereupon he went away without doing any thing, and came again in *July*, when he held his visitation, and they behaved themselves contumaciously, and refused to submit to his authority; this was *contra officii sui debitum*: it is reasonable that both head and members should submit to the visitor; contumacy is a good cause of deprivation; and upon good reason, because it hinders an inquiry into all other causes: it was held so in the case of *Bird v. Smith*, and in *Allen v. Nash*; *quia fuit refractarius*: now though contumacy be not one of the causes mentioned in the statutes, yet it was certainly contrary to their duty; turning their backs upon the visitor; not appearing upon summons; refusing to be examined, was an offence, and contrary to what the statutes require. He is to inspect the state of the college, and each member's particular behaviour; and now when the visitor comes to make such an inquisition, and the head or the members withdraw themselves, and will not appear to be examined, if this be not a good cause of deprivation, nothing can be, for that nothing else can ever be inquired into.

6 Com. Dig.
"Visitor"
(A. 15.)

See Ayl. H.
of Oxford,
2 Vol. 80.

1 Bl. Rep. 22.

As for that statute which refers to the causes for which a rector may be deprived, it doth not relate to a deprivation in a visitation; but shews the manner, how the college is to proceed, if he be guilty of such offences; they may complain at any time to the visitor, if he wastes the revenues, or behave himself scandalously, and upon request will not resign, and they may article against him out of a visitation; but when he comes to execute his power in his quinquennial visitation, he is not confined to proceed only upon the information of the fellows, but is to inquire into all the affairs of the college, and may proceed to deprivation as he sees cause. Now contumacy is a *cause* of a forfeiture of his office, which is subject to the power of the visitor by the original rules of the foundation; and to evade or contumaciously to refuse or deny a submission to that power, is an offence against the duty of his place, and consequently a just cause of deprivation; so that upon the whole matter, it was inferred and urged, that the bishop hath a visitatorial power vested in him to deprive the rector without consent of the four senior fellows. And 2. that the justice of the sentence is not examinable in *Westminster-hall*. And 3. that if it were, and the cause necessary to be shewn, here was a good one, an affront-
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ing the very power of visiting, and setting up for independency, contrary to the will of the founder; and therefore it was prayed that the judgment should be reversed.

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IT WAS ARGUED *on the other side*, by the counsel with the judgment, That this sentence was void; that it was a meer nullity; that this proceeding had no authority to warrant it; and that it being done without authority, it is as if done by a mere stranger, and whether it be such an act, or not, is examinable at law; for that the power of a visitor must be considered as a mere authority or a trust, and it is one, or rather both, and then either way it is examinable; for every authority or trust hath, or ought to have, some foundation to warrant it; and if that foundation which warrants it, hath limited any rules or directions, by which it is to be executed, then those directions ought to be pursued; and if they are not, it is no execution of the authority given, or trust reposed; and if not, it is a void act, a mere nullity, and consequently it is that of which every man may take notice and advantage.

1 Vesey 462.

6 Com. Dig.
"Visitor" (D.)

Then it was said, That it must be agreed that of a void thing all persons may take advantage, and contest it in a collateral action, and that although it have the form and semblance of a judicial proceeding: and for this was cited the case of the *Marshalsea*, 10 Co. 76. as a full authority; the resolution was, That when a court hath no jurisdiction of a cause, there all the proceeding is *coram non judice*, and actions lie against any person pretending to do an act by colour of such precept or process, without any regard to its being a precept or process; and therefore the rule, *qui jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est*, will not hold, where there is no *judex*, for it is not of necessity to obey him who is not judge of the cause; and therefore the rule on the other side is true, *judicium a non suo iudice datum, nullius est momenti*; and so was it held in the case of *Bowyer v. Collins*, 22 Edw. 4. 33. per PRIGOT, and 19 Edw. 4. 8. And therefore if the court of *Common Pleas* held plea of an appeal of felony, it is all void; but it must be owned, that the mere erroneous procedure of a court which hath a general jurisdiction of the subject matter is not examinable in a collateral action, whether upon true grounds, or not; and yet if it be a limited jurisdiction, and those limits are not observed, even that is *coram non judice*; and holds with respect to courts held by authority of law, which are much stronger than the cases of power created or given by a private person. A sheriff is bound by law to hold his turn within a month after *Michaelmas*, and he holds it after the month, and takes a presentment at that time, if that be removed into the *King's Bench*, the party shall not answer it, but be discharged, because the presentment was void, *et coram non judice*; for that the sheriff at that time had no authority; and yet in that case his authority and jurisdiction extended to the person and thing: the same law for a leet,

Cowp. 378.

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unless custom warrants the contrary, and then that custom must be pursued.

The commissioners of sewers have a limited authority; and if the number of persons, or other requisites mentioned in their commission, be not pursued, what they do which exceeds it is void; and yet they have a kind of legislative authority; so is it in *Sir Henry Mildmay's case*, *Cro. Jac.* 336. and there they had an authority both of thing and person, but did not observe the rules prescribed in the gift of that authority, according to the 23 *Hen.* 8. cap. 5. and no reason could, or can be given for that resolution, but that it was a particular limited authority: and then, to apply this to the present case, the sentence in question can no more aggrieve the defendant, than an order pronounced or made by a *non judex*, if it be not agreeable to the power given by the statutes; and this appears further from *Davis's Rep.* 46. where the same distinction is allowed.

Nay, in some cases, the award of a wrong process is void; as if by a steward of a manor court, that a *capias* should issue, where the same doth not lie, but only an attachment, *Turville and Tipper's case*, *Latch.* 223. A court of pypowders hath jurisdiction of an action of the case; yet if it hold plea of case for slander, it is all void, though the words were spoken within the boundaries of the fair, because the jurisdiction is limited; so that if the thing, the time, the person, or the process, be not regarded according to the authority given, it is all void, and an advantage may be taken of it by any body, where the plaintiff claims or makes his demand by colour of such act.

(a) 1 Vent. 199.

Ray. 236.

2 Lev. 21.

1 Mod. 86. 300.

1 Eq. Abr. 111.

See also *Malloon*

v. *Fitzgerald*,

3 Mod. 28.

2 Show. 315.

Skin. 125.

Scott v. Taylor,

2 *Brown's Chan.*

Cases, 431. and

Comyn's Rep. 748. *Ambler* 256. 1 *Brown*, C. C. 303.

It was further argued, That the reason given in that case of *Latch*, is, because the custom which gave him his authority, gave him notice that such process did not lie; and if any man hath by our law any estate, right, or privilege, by any particular means, he is bound to take notice of all the conditions and qualifications annexed thereto: and the reason is just, because the same means by which he had notice of the benefit, gives him notice of the restrictive limitation and penalty, and so was it held in the case of *Fry v. Porter.* (a)

By our law no benefit can accrue to a man by a judgment given on a thing arising *extra potestatem curiæ*, in case of a particular and limited jurisdiction; as in the case of *Kingsfon upon Hull*, *March* 8. which held plea of debt upon a bond made *extra jur'*, &c. and a judgment, and *capias* executed, and an escape; and held that no action lay for the escape, because all was void, and *coram non judice*: in the same book, *March*. 117, 118. *Dye and Olive's case*, in false imprisonment, plea that he was serjeant at mace belonging to a court of record, and that a warrant was directed to him to arrest the plaintiff

plaintiff *pro quodam contemptu*, and held not good, because not shewn, in what action, and how within the jurisdiction; and if not within it, it was *coram non judice*, and void. (a)

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(a) See the case
of Trevor v.
Wall, Cowp.

Then it was argued, that this was a limited qualified power; that the visitor was a creature of the founder; and if it had been the heir of the founder, he had been as much bound and restrained by the statutes, as a stranger: and though the law should be agreed to be, as is pretended, that it appoints a visitor, yet still (whether he be the heir or nominee of the founder) he is an officer only within the limits and rules of the foundation, and the statutes made thereupon: as he hath a visitatorial power only over this college, so he hath it only after the manner in which it is given to him.

5 Mod. 422.
3 Atk. 662.
1 Vesey 78.

If the founder had made no particular visitor, but yet had appointed that the same should be visitable at such a time, and in such a form, he himself had been bound by these rules; and if he would have been so confined, with much more, or at least with the same reason, ought his nominee; for *cujus est dare, ejus est disponere*; and every argument which hath been urged for the rector's being subject to the rules of the foundation, may likewise be applied to that of the visitor: he that made the visitor, may restrain, shape, and modify the power which he gives him: he might have made him visitor only once in his life, or only upon request, and have left all other jurisdiction to the rector and fellows.

But further, here he is found to be visitor only *secundum formam statuti et vigore statuti*, and to execute those statutes; and that which makes him a visitor, makes him such thus and thus qualified, and no otherwise: whatsoever power or authority the name or office of a visitor may import *ex vi termini*, no man can say but this visitor is controuled by the statutes, which make him so; now had there been no statutes, he had never been visitor; then these statutes making him a visitor, upon particular terms and conditions, times and occasions, *extra* these terms and conditions he is no visitor at all; this seems plain and natural: so that if he exceeds the bounds prescribed to him as visitor, he doth not act as visitor; for all powers, authorities, and jurisdictions, especially such as are created by private persons, must be executed according to the express institution, or plain meaning of the party that created them, and according to the circumstances, with which he hath circumscribed them: so is the rule in *Berwick's case*, 5 Co. 94. and Co. Lit. 113. and 258. An executor is an officer or person intrusted, which is taken notice of by the law, yet in his creation he may be limited *quoad* the estate in one country, or *quoad* one particular, and he cannot intermeddle any further; but administration shall be granted as to the rest.

1 Vesey 462.

Then it is observable, that this statute visitor is not a court of record, nor any court at all, but rather like an arbitrator under cer-

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See Dr. Wal-
ker's case,
B. R. H. 212.

tain directions, he can neither meddle at another time, or with other matters, or in other manner, than what is prescribed. But admitting it a sort of judicature, here is no appeal or writ of error, or prohibition or *mandamus* lies; nay, the visitor himself cannot relieve against his own sentence, or restore the party deprived the next day; but the place being vacant, a right of election accrues to the fellows; it is therefore unreasonable to suppose him not restrained, or that his acts, if exceeding the limits and rules set him, shall be conclusive and binding.

This is like a lay-hospital, it is not a religious body, though some call it mixt; and in case of temporal lay offices, there must be some remedy at law, as is 13 *Rep.* 70. so is *Dyer* 209. and 3 *Inst.* 340. Where no appeal is allowed, another examination must be admitted; and thus seems the 8 *Affize*, pl. 29. though it hath been quoted on the other side; if the warden of an hospital be irregularly deprived, he shall have his remedy at law; and 13 *Affize*, 2. to the same effect: *Bagges's case*, 11 *Rep.* repeats the same case, which shews *Coke's* opinion to concur with it; and though an affize doth not properly lie, yet the meaning is, he shall have relief, *i. e.* such suit at law as is proper to his case: the same distinction is allowed in *Dr. Sutton's case*, *Latch.* 229. And that a remedy is given by the law in this case of a temporal property, seems to be plainly affirmed in the statute of 24 *Hen.* 8. cap. 12. And further, though strictly and properly it were not of common law consueance, yet it falling incidentally to be a question upon trial of a title, the court before whom that suit depends, must examine that incident; as in case of an issue, lawfully joined in marriage or not, the trial shall be by certificate of the ordinary; but if it be a question upon the trial of a title to land, the matter shall be tried and judged without certificate.

The wisdom of our law hath been such, as very rarely to trust any of the courts of justice with the final determination of matters of law in the first instance; and it would be strange that this case of a visitor should stand single by itself. Besides to prevent a failure of justice, the law doth of necessity admit of several other provisions and methods of examination or trial, than what the subject matter or person would properly in their own nature require, especially in point of remedy and relief, as appears in *Dormer's case*, 5 *Rep.* 40. and 1 *Inst.* 54. 2 *Roll's Abridg.* 587. now here is no other remedy, nor other way of trial, for deprivation is not triable by certificate, but only in case of an ecclesiastical person.

As to the objection from *Appleford's case*, *Sid.* 71. there that writ was fully answered, and they could not examine into the truth and falsity of that answer, but must leave the party to his action; and it doth not thence follow, that in an action there is
no

no remedy: but the strongest objection is, that in pleading a deprivation, you need not shew the cause, and it must be taken for just and good, as *Moore* 781. *Jones* 393. *Moore* 228. 2 *Roll's Abridg* 219. 9 *Edw.* 4. 25. that need only shew by whom: all these stand upon the same foundation, they were by authority ecclesiastical, and must stand till repealed; and even those cases of the high communion court, they were by the course of the ecclesiastical law, which was saved to them by the proviso, in 1 *Eliz.* and therefore shall be intended so, till the contrary appear: and even there it was, *debito modo privatus*, which implies, all due requisites; but here the whole is disclosed, upon a special verdict; it is not found here, that he was duly deprived; but that he was deprived after such a manner, which if it appears to have been without authority, must be null: as to *LEY's* opinion in *Davis* 47. that a sentence of deprivation in case of a donative by an ordinary, was effectual in law, till reversed; that is not law, for it was all *coram non judice*, *Bro. Præmunire* 21. *Nat. Br.* 42. the ordinary cannot visit a benefice donative.

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Then they object, that this is an eleemosynary interest, and the rector took it under those terms of subjection to such a visitor, but that is the question, what those terms are, and the consequences of such an opinion may be dangerous to the universities, those nurseries of learning and good manners, it is to make them too precarious and dependent upon will.

And as to the pretence that the land was the founder's, and he might dispose of it at pleasure, it was answered, that before the gift, the lands and the profits and the ownership were all subject to the common law, and the owner could not give such a power as is pretended, no more than he could oblige all differences about his estate to be finally determined by a particular person, and his heirs or successors: no absolute power can be fixed in this nation by custom, but rather than the same shall be allowed, the custom shall be void; *Co. Lit.* 14. *Davis* 32. 2 *Roll's Abridg.* 265. Copyholds were anciently at mere will and pleasure, but the lord is now obliged to, and by certain rules: by our law the power of parents over children is qualified and restrained; it is no argument to say that the visitor comes in *loco* or *vice fundatoris*, for the alienation and the statutes did oblige even himself: and though perhaps if no statutes had been made, his visitatorial power had been much larger, yet since it is limited to once in five years, and his acts to be with others consent, it is as much as if he had given the college a privilege of exemption by words express, from any visitation, at all other times, and in all other manners, than those which are mentioned: then was cited the case of *Terry v. Huntington*, before *SIR MATTHEW HALE*, trover for goods, seized by warrant of the commissioners of excise, the question was, when they adjudged low wines to be strong wines perfectly made, upon 12 *Car.* 2. c. 23. whether it might be drawn in question

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quer, Trinity
Term, 20 Car.
1. Hard. 430.

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question again by an action in *Westminster-hall*, and held it might, though they were judges, and though the statute gave an appeal; and the reasons given there seem to reach this case, because they had a stinted limited jurisdiction, and that implies a negative, viz. that they shall not proceed at all in any other cases; and that special jurisdictions might be and frequently were circumscribed, 1. with respect to place, as a leet or a corporation court; 2. with respect to persons, as in the case of the *Marshallsea*; 3. with respect to the subject matter of their jurisdiction: and if judgment be given in another place, or upon other persons, or about other matters, that all was void and *coram non judice*; and though it was objected, that strong wines were within their jurisdiction, and that it was only a mistake in their judgment; yet it appearing upon the special verdict, that they were low wines, the action was held maintainable; this is so plain, it needs no application.

Then it was argued, that this sentence was void, 1. because there was no authority to visit at this time, there having been a visitation by the commissary within five years before; that no words in the statute make him a visitor generally, but only *secundum stat*, i. e. upon request, or without request, *a quinquennio in quinquennium, semel*, now here is no request found; then the act of Dr. *Masters* as commissary is an exercise of the visitor's office; *Colmer's* appeal was to the bishop as visitor; *semel* implies a negation of having it more frequent: according to grammar, it signifies once and not oftener or, once for all: if *semel* comes alone, without any other particle, then it is but once, and if with another, as *ne semel*, it is not once, or never: and the *liceat semel* can have no other construction; it cannot mean once at the least, as was argued below, especially as opposed to request: and no argument can be drawn from the necessity of frequent visitations, for that evils are not to be presumed; and over inferior members, there is a power in the rector and four seniors: now Dr. *Masters* was not requested by the college, nay, they protest against it in some degree, i. e. so far as relates to *Colmer's* restitution; the oath of a scholar being against appeals: and the oaths and the contents of them are to be deemed part of their constitution; but supposing that business might be examined as a thing proper for consideration, when an inquiry is made into the state of the college; and the admission, continuance, and removal of the members is certainly one article of such inquiry, yet that must be done in visitation, and as visitor, for there is no other power found in the verdict but that.

2. Admitting that no action of Dr. *Masters* to be visitation, yet this sentence is void, because it held above three days, and the statutes say, after three days it shall be taken *pro terminat' & dissolut'*. On the sixteenth of *June* he comes with intention to visit, doth an act proper to his office and business, examines the summoner about

about the citation; if he had come and only examined and made no decree, it had been a visitation; and either it is a *quinquennial* one of itself or it is a commencement of one, and either one way or other, it makes the deprivation void: it is afterwards entered as a visitatorial act; *eundem actum pro parte hujusmodi negotii visitationis haberi decrevit*, and then he adjourns; it is no argument to say that he was hindered, for he might have proceeded *in absentia*; and if the sixteenth of June be tacked to it, it is longer than the time: there needed no formal adjournment, for that he is authorized to proceed in a summary way: it is no such absurdity to call that a visitation which was in some sort hindered, since notwithstanding the obstruction some acts were done, and more might have been by adjourning to another place.

3. Here was no such cause as could warrant a deprivation, it was not one of the causes mentioned in the statutes, which are not directions merely, but they are the constituent qualifications of the power; and contumacy is none of the causes, nay, here is no contumacy at all: the offence of the suspended fellows, was only a mistake in their opinions, and the doctor's was no more; and it is not a contumacy for refusing to answer to, or for any crime within the statutes, for there was none of the crimes mentioned in the statutes laid to the charge of the rector; if the crime charged had incurred deprivation perhaps a contumacy might be evidence of a guilt of that crime, and so deserve the same censure; but contumacy in not consenting to a visitation can never be such, especially when the consenting to a visitation is not required under pain of deprivation.

See Rex v.
Bishop of Ely,
2 Term Rep.
290.

4. Admitting the visitor legally in the exercise of his office; that here was cause of censure; that the cause or crime was deserving of that punishment which was inflicted; that deprivation was a congruous penalty for such an offence: yet it was argued, that this sentence was void; for that the visitor alone was in this case *minus competens judex*, because his authority was particularly designed to be exercised with the consent of others, which was wanting in this case: this was the same as if it had required the concurrence of some other persons *extra colleg'* than that such a concurrence was necessary, appears from the words of the statute, his meaning seems plain upon the whole, to require it. A greater tenderness is all along shewn to the rector, than to the scholars, it is *sine quorum consensu irrita erit hujusmodi expulsio & vacua ipso facto*: and the sentence itself shews it necessary, because it affirms itself to be made with such consent; and it cannot be thought that the rector should be deprivable without their consent, when the meanest scholar could not.

Then here is no such consent, for it is not of the four seniors, but of the four seniors not suspended; now this doth not fulfil the command of the statute, for the suspension doth not make them to be no fellows, a suspended fellow is a fellow though suspended;
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a suspension makes no vacancy; the taking off of the suspension by sentence or by effluxion of time, doth make them capable of acting still, without the aid of any new election, and they are in upon their old choice, and have all the privileges of seniority and precedence as before.

If they ceased to be fellows by the suspension, then they ought to undergo the *annum probationis* again, and to take the oaths again: in case of benefices or offices, religious or civil, ecclesiastical or temporal, it is so; a suspension in this case is only a disabling them from taking the profits during the time it continues: and it is no argument to say, that their concurrence was not necessary, for that they had withdrawn themselves, and were guilty of contumacy; for that a man guilty of contumacy might be present, if withdrawn from the chapel, he might be in the college, or in the university, and it is not found that they were absent: and then their consent not being had, the sentence was void and null, and consequently no title found for the lessor of the plaintiff in the action below.

IT WAS REPLIED *in behalf of the plaintiff*, much to the same effect as it was argued before, and great weight laid upon the contumacy, which hindered the observance of the statutes; that by allowing such a behaviour in a college, no will of the founder could be fulfilled, no visitation could ever be had; and all the statutes would be repealed or made void at once; that though this crime was not mentioned, it was as great, or greater than any of the rest; that here was an authority, and well executed, and upon a just cause, and in a regular manner, as far as the rector's own misbehaviour did not prevent it; and therefore they prayed that the judgment might be reversed.

And upon debate the same was reversed accordingly.

By 27 Eliz. c. 8. error lies immediately from the King's Bench to the House of Lords, except the suit be by original.

Lev. Ent. 82.
Cro. Car. 142.
1 Sid. 240.
Ray. 275.
Cro. Eliz. 731.
Doug. 350.

NOTE, That in this case there was one doubt conceived before, and another after this hearing: THE FIRST was, if a writ of error lay in parliament immediately upon a judgment in the *King's Bench*, without first resorting to the *Exchequer Chamber*; but upon perusing the statute which erects that court for examination of errors, it appeared plainly that that act only gives the election to the party aggrieved to go thither; that it did not take away the old common law method of relief: in parliament and so hath the practice been; but upon judgments in the *Exchequer Court*, the writ of error must first be brought before the Lord Chancellor, and cannot come *per saltum* into parliament, because the statute in that case expressly ordains, that errors in the court of *Exchequer* shall be examined there; and so held in the case of the earl of *Macclesfield* and *Grosvenor*.

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THE OTHER DOUBT was raised by a motion in the King's Bench for the Court to give a new judgment upon the reversal above; and insisted on, that it ought so to be, as was done in the case of *Faldo v. Ridge*, *Yelv.* 74. entered *Trin. 2 Jac. 1 Rot. 267.* Trespass and special plea, and judgment in *B. R.* for the defendant; and upon writ of error in the *Exchequer Chamber*, the judgment was reversed; and upon the record returned into the *King's Bench*, they gave judgment: for otherwise they said, the law would prove defective; and a precedent was shewn in *Winchcomb's case*, 38 *Eliz.* where the same course was taken; and the like rule was made *Mich. 1 Will. 3 Mar.* upon the reversal of the judgment in *Claxton v. Smith*, which is entered *Mich. 2 Jac. 2. B. R. Rot. 645.* the like in the case of *Sarsfield v. Witherley*.

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BURY.

If a judgment for a defendant in the King's Bench be reversed on error to parliament, judgment shall be there given, "that the plaintiff shall recover," for the King's Bench by the first judgment has executed its authority.

It was argued on the other side, that the court which reverses the judgment ought to give the new judgment, such as ought to have been given at first, that in the *Exchequer Chamber* it may be otherwise, because they have only power to affirm or reverse; for yet in the case of *King v. Seutin*, the *Exchequer Chamber* gave a new judgment, though they cannot inquire of damages; and that is a kind of execution which must be in the King's Bench. In *Omulkery's case*, *Cro. Car.* 512. and *Cro. Jac.* 534. the court here sends a mandatory writ to command them in *Ireland* to do execution there, *St. John v. Cummin*, *Yelv.* 118, 119. 4 *Inst.* 72. If writ be abated in *C. B.* and error brought in the King's Bench, and the judgment be reversed, shall proceed in *B. R.* and 1 *Rolls* 774. to the same effect, *Green v. Cole.* 2 *Saund.* 256; the judges commissioners gave the new judgment. It is true, in *Dyer* 343. the opinion was that he was only restored to his action, and then writs of error were not so frequent. The judgment may be erroneous for the defendant, and yet no reason to give a judgment for the plaintiff, as in *Slocomb's case*, 1 *Cro.* 442. the Court gave a new judgment for the defendant; therefore it properly belongs to the Court, which doth examine the error, to give the new judgment; the record is removed, as *Fitzh. Nat. Brev.* 18, 19. on false judgment in ancient demesne; v. 38 *Hen.* 6. 30. and *Griffin's case*, in error on a *quod ei desorceat*, in 2 *Saunders* 29, 30. new judgment given here. In the case of *Robinson v. Wolley* in 3 *Keeble* 821. Ejectment, special verdict, judgment reversed in the *Exchequer Chamber*, and they could never get judgment here, the court of *Exchequer Chamber* not having given it.

And in the principal case, after several motions in the court of *King's Bench*, the *remittitur* not being entered there, a motion was made in parliament upon this matter, and a new judgment was added to the reversal, that the plaintiff should recover, &c.

Case 231.

* Howard *against* Tremaine.

* [363]

Depositions in
chancery taken
de bene esse, are
good evidence at
law, although
the witnesses die
before the answer
is put in.

S. C. 4 Mod.
146.
S. C. Salk. 278.
S. C. Carth.
265.
Post, 397.
Godb. 326.
1 Keb. 21. 685.
2 Mod. 231.
1 Sid. 221.
Caf. Ch. 65.
4 Mod. 146.
5 Mod. 211.
1 Salk. 286.
1 Atk. 445.
2 Vern. 700.
Bunb. 205.
1 Chan. Cases,
73.
Hard. 315.
4 Com. Dig.
"Evidence"
(C. 3.)
Bull. N. P. 239.

EJECTMENT. On the trial were produced as evidence for the plaintiff, certain depositions taken in chancery: a bill was filed, and a *subpœna* issued, and depositions taken *de bene esse*; and the witness dies before answer: and upon this evidence a verdict for the plaintiff. But the *poslea* ordered to be stayed till the opinion of THE COURT was had.

And now it was argued that they were good evidence; for the end of the bill was to examine witnesses *in perpetuam rei memoriam*; and if there had been an answer, then they must be re-examined if living, but here they dying before answer, are always allowed to be read in chancery. It is true, that generally speaking there ought to be bill and answer proved before depositions; but here the witnesses die before answer, and it was through the defendant's default, and that there was no answer; and his standing in contempt shall not prejudice the plaintiff who cannot keep his evidence alive. Here the defendant joined in commission, and cross examined them; this is always allowed as evidence there; and that court is time out of mind; and part of their business is to perpetuate testimony: and, if this be not evidence, any defendant may, by his obstinacy, deprive me of the testimony of ancient witnesses by refusing to answer till their death. In *Godb. 326.* it was a question, if depositions after answer between the same parties were to be allowed as evidence; and held that it was, if could not be found upon search, though not dead. See 2 *Rolls Abr. 679.*

TREMAIN Serjeant à contra. They are no evidence, because there was no answer. Here was no issue joined; and no perjury can be assigned upon such depositions, because no issue is joined. *Cro. Car. 352. Sharp's case, 3 Inst. 167.* To make perjury, it must be in a matter pertinent to the issue: it is the common practice to produce bill and answer: in the case of *Ford v. Gay*, tried at bar in the Common Pleas, an exemplification was produced of depositions in chancery, and because no answer was shewn, the depositions were rejected, by POLLEXFEN Chief Justice *et al' ibi.* It is the answer that makes the depositions of any validity. Depositions in case of an answer by an infant by his guardian may be read, though the answer be no evidence against himself.

Comp. 594.

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* **HOLT Chief Justice.** *Quere*, if any court by course of law can examine witnesses till issue be joined; and therefore I much doubt if these can be evidence. We cannot take notice what the chancery allow as evidence, and their practice is no rule to us.

DOLBIN Justice dubitans. For that the court of equity is not so ancient; for before *Richard the Second*, the petitions were to the king, and by him referred sometimes to the chancellor, and sometimes
§
to

to the treasurer, but no settled court of equity before the chancellor, till the time of *Richard the Second*.

HOWARD
v.
TREMAYNE.

GREGORY *Justice*. That it is good evidence, because they joined in commission, and did cross examine.

EYRES *Justice* clearly of opinion, that it is good evidence; that the court of equity hath been time out of mind.

But because HOLT *Chief Justice* *hæsitavit*, *adjournatur*. (a)

(a) It is said, S. C. 4 Mod. 147. that the Court inclined not to allow these depositions to be good evidence; but S. C. Carth. 265. says, that after much debate, the Court was of opinion that they might

be given in evidence; and with this S. C. 1 Salk. 278. seems to agree. But see Bull. N. P. 239. Cowp. 17. Goodright v. Mofs, Cowp. 591.

Whittingham *against* Andrews.

Case 232.

ERROR upon a judgment in ejectment in *Durham*. EXCEPTION was taken that the declaration was on a lease in ejectment *de mineri carbonum* in such a parish, and not said how many, or all, *Yelv.* 166.—E CONTRA argued that it was well enough; for *de omnibus* would be all one with this, and this general was equivalent to an universal, and cited 11 Co. 25. *Moore, pla.* 1130. *Adjournatur*. (a) —NOTE, *Cumming's case*, *Cro. Jac.* 150. is the first case adjudged, that it would lie for a coal mine.

An ejectment *de mineri carbonum* in such a parish, is good, without saying how many.

S. C. 4 Mod. 143.
S. C. Salk. 255.
S. C. Comb.

201. S. C. Carth. 277. *Cro. Jac.* 150. *Noy* 121. 1 *Roll. Rep.* 483. *Hard.* 57. *Yelv.* 166. *Dougl.* 305. 1 *Term Rep.* 11.

(a) The judgment was affirmed, S. C. 4 Mod. 143. and the reason seems to be, because the word being in the plural

number, comprehended all the mines in the parish. *Run. Eject.* 35.

The King *against* the Mayor and Aldermen of Exeter.

Case 233.

EYRES *Justice*. That no peremptory *mandamus* lies to restore him, because they have returned one good cause of removal, *viz.* his own removal with his family to live at *Topsham*. It is the duty of his office to attend there, to be resident there, and to be assistant at the councils there: an alderman is no place of profit, but only of freedom, precedence, and authority in the city, which is all to be had and done there; *deseruit et reliquit* is a total desertion with his family. It is true, we must intend every thing against the return for the sake of freedom, and so is 3 *Bulstr.* 189. 1 *Rolls Rep.* 409. *Rex v. Mayor of Gloucester*; but * here it is plain; and I am of opinion, that though he did return again, yet that does not shew cause against his removal, and answer the charges alledged against him.—S. C. 4 Mod. 33. S. C. Comb. 197. S. C. Holt 169. 435. S. C. 12 Mod. 27. Cowp. 503.

An alderman who withdraws himself and his family from the city, and neglects to attend his duty there, may be removed from his office; but before removal, he ought to be summoned to attend the court, in order that he may

* [365]

purge

KING
v.
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EXETER.
Sess. 59.

purge the forfeiture, though he do return before the disfranchisement for that cause. In case of estates, if a forfeiture be committed by a grant upon condition though the estate be regained by force of the condition, yet the lessor may enter for the forfeiture: as to contemptuous words, and the like, he ought to be summoned to answer them before he be disfranchised; but in this case he need not be summoned, for they are not bound to go out of the city to summon him. (a)

GREGORY *Justice* of the same opinion, that here was cause sufficient for to remove him, that he with his family left the city: then the *ex causis prad.* relates to all.

DOLBIN *Justice* doubted. Not that the leaving the city is a good cause of removal, but that they do not say, that he never returned again; for if he returned again, he purged the offence, and he ought to have been admitted as an alderman, unless he were removed before.

HOLT *Chief Justice*. There ought to go a peremptory *mandamus* to restore him; though I agree with my brothers in every thing; his desertion of the city is cause of removal; his frequent absence is a cause; for every alderman ought to be a citizen and inhabitant by the charter: if he remove with his family, he ceases to be a citizen, though he be a freeman, *Moore*, 135. 833. *Deferuit et reliquit*, is an absolute leaving of the city, and must be so understood. But here is no good *summons*; for though he do commit never so many causes of forfeiture, there ought to be a reasonable summons for him to answer them, and so is *James Bagg's case*. There is a summons for his attendance, but it is not said that there was any summons for him to appear to answer those particular matters. Now the frequent absence can be no good cause, unless summoned, for he may shew sickness, or business of the king's as good cause. Then if a summons be necessary upon a dereliction; I agree no summoning is necessary out of the place, and they are not to summon him, if out of the city; but there is a possibility that he might return again, and if he did return again with his family before disfranchisement, possibly it might reinstate him. But undoubtedly if he was an inhabitant afterwards within the city, and they might have summoned him, then they ought to have summoned him to have answered it, and he might have given an excuse. Now this being a return, it must be certain to every purpose. If in a plea, this were well enough, and we could intend nothing else than that he continued *extra libertat'*; but being in a return, where there is no opportunity of answer, it ought to be more certain. (b) Suppose * he had been an inhabitant when they removed him, then a summons was necessary. Now this return is true, and consequently

(a) Non-residence, though a good cause of removal, does not, *ipso facto*, determine the office, but there must be a judgment of motion by the corporation, before an in-

formation in the nature of a *quo warranto* will lie, *Rex v. Heaven*, 2 Term Rep. 772.

(b) 6 Mod. 309. 2 Salk. 432. 2 Burr. 733.

no action lies, if that were the case, and that might be it for any thing that appears to the contrary; and therefore a peremptory *mandamus* ought to go. *Sed ceteri in contrar.* (c)

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v.
MAYOR OF
EXETER.

(c) The return therefore in this case was held good, S. C. 4 Mod. 37. and the peremptory *mandamus* was denied, S. C. Comb. 198. S. C. 12 Mod. 29. S. C. Holt, 436.—Upon a *mandamus* to restore an alderman, the return was that he had misemployed the revenue of the corporation and erased one of the corporation books; and that being charged with these crimes, he had been heard what he could say in his defence; an exception was taken that a *summons* was necessary in all cases of disfranchisement, except the party does not live within the corporation, but at some distant place; by HOL. T. Chief Justice, a man ought not to be disfranchised until he has been heard in his defence upon notice and preparation, and *summons* is only ne-

cessary for that purpose; therefore if a man be charged in *plenis comitiis* and ordered to prepare by such a time, this will be good though there be no *actual summons*, for *summons* is only necessary to give the party an opportunity to make his defence, and if he be heard, &c. it is enough, Rex v. Chalke, Easter, 9 Will. 3. 1 Ld. Ray. 225. Salk. 428. 5 Mod. 254. 257. See also Morris's case cited 4 Mod. 37. but in the case of Rex v. Lyme Regis, Easter Term, 19 Geo. 3. it is determined that where *non residence* is good cause of *amotion*, it is not necessary that the party should be summoned to reside, previous to the proceeding, to amove him. Dougl. 149. 160.

Rogers against Cooke.

Case 234.

ACTION as administrator; and counts on an *indebitatus* and *quantum meruit* to the intestate, and an *in simul computasset* between plaintiff and defendant, of divers sums due to the plaintiff, and an *assumpsit* to him: and held ill.

An administrator cannot join, in the same *assumpsit*, a debt due to himself, and a

debt due to the intestate.—S. C. Salk. 10. S. C. Carth. 235. S. C. 1 Will. 172. Moor 419. Cro. Eliz. 406. Hob. 184. 1 Vent. 268. Salk. 10. 2 Lev. 110. 228. 1 Will. 248. 2 Will. 319. 3 Will. 348. 456. See the case of Petrie v. Hannay, 3 Term Rep. 659. Jennings v. Newman, 4 Term. Rep. 347. Rolfe v. Bowler, H. B. Rep. 108.

Boteler and his Wife against Bradbourne.

Case 235.

DEBT upon a recognizance: and held to lie; and judgment for the plaintiff.

Debt lies on a recognizance.

599. 1 Leon. 52. Dyer 219. Cro. Eliz. 608. 6 Mod. 132. 1 Brownl. 65. Ray. 14. 2 Com. Dig. "Dett," (A. 3.)

1 Roll Abr.

Carter against Coltroppe.

Case 236.

Hilary Term, 3 Will. & Mary, Roll 508.

ACTION on the case for building and erecting and continuing a nuisance, with an *adhuc existit*.—ET PER CURIAM ill; because that *adhuc existit* is to the time of the declaration, and consequently damages demanded for what accrued after the action brought, if in inferior court, because of the plaint continued here by bill.

In an action for a nuisance the continuance must be alleged to the time of the action only.

S. C. 4 Mod. 152. S. C. Carth. 261.

345. Cro. Eliz. 191.

Case 237.

Rudd and his Wife against Berkenhead.

Hilary Term, 1 Will. & Mary, Roll 164.

In replying an attachment of privilege to the statute of limitations, all the continuances must be stated.

S. C. Carth. 144.
S. C. 2 Salk.

420.

3 Mod. 111.

2 Show. 79.

Stiles 373.

* [367]

CASE upon *assumpsit*. Declaration by *bill* against the defendant in custody. Statute of limitations pleaded. The plaintiff replies an *attachment of privilege* sued out. The defendant demurs.

An exception was taken that the count is by *bill*, as in *custodia marshalli*, and no imparlance or continuance.

* E CONTRA. The case of *Whitehead v. Brickland*, was urged, *Styles* 373. That an appearance helps it: *sed adjournatur*. (a)

But by HOLT Chief Justice. An attachment of privilege is but as a *latitat*, and not as an original. (b)

(a) The Court held the replication bad because the continuances were not set forth, S. C. 2 Salk. 420; but they gave the plaintiff leave to discontinue, S. C. Carth. 144. That the continuances must be duly shown, see 2 Bl. Rep. 1133. 2 Burr. 961.

Tidd's Practice 78.—(b) It is determined that an attachment of privilege is not a continuance of a bill of Middlesex so as to avoid the statute of limitations, *Smith v. Bower*, 3 Term Rep. 662.

Agist twenty 219, 137 *Contra* *See Hayward v. Goddard*
Barth's Notes 410.
Case 238. Frederick against Godfreight. *common Pleas*

To *assumpsit*, a plea of goods delivered, must aver that the plaintiff received them in satisfaction

CASE, upon *assumpsit*. The defendant pleads, that the plaintiff had received goods in satisfaction. And, upon demurrer, an exception was taken, because he doth not say that he paid, or delivered them in satisfaction. *Adjournatur*. (a)

S. C. Carth. 237.

(a) It is said S. C. Carth. 238. that not say that he gave the wares in full satisfaction. the plea was held ill "because he did

Case 239.

The King against Litten.

Conviction on 33 Hen. 8. c. 6. for keeping a gun.

Ante, 48.

Plow. 17. 206.

2 Brownl. 266.

3 Co. 120. 2.

6 Mod. 125.

Cro. Eliz. 294.

821.

Boicowen on

Convictions 29.

CONVICTION by justices of Gloucestershire on the statute 33 Hen. 8. c. 6. l. 16. for going with an hand-gun, not being qualified.

EXCEPTION, that he was not taken upon the view, and so brought before the justices; for without that the justices had no authority to proceed in that summary way. Now here this conviction is a month after.

Adjournatur.

2 Term Rep. 18.

Carey

Carey against Calleis.

Cafe 240.

ACTION on the cafe, by the bailiff of *Westminster* brought, and declares in the fame manner as in the cafe of *Carey v. Bacchus*, which fee above (a); and the roll of it brought into court, and the fame judgment given as there, viz. for the plaintiff.

The bailiff of a liberty need not state his title specially in an action against a sheriff's officer for entering his

bailiwick. — S. C. Comb. 198.

(a) Ante, 17. S. C. Comb. 31.

* Burton against Woodward.

Cafe 241.

* [368]

IN ejectment, special verdict. The question thereon was, whether the six months in the late act, 1 *Will. & Mary*, c. 8. for taking the oaths under penalty of deprivation of church livings, shall be *lunar* or *calendar* months.

Qu. if the "six months" mentioned in the 1 *Will. & Mary* c. 8. for taking the oaths shall be *lunar* or *calendar* months.

MR. WEBB for the plaintiff. They shall be *lunar months*, because of the uncertainty in the other. (a) The word "month" can have no other construction than that of lunar, and in that of the *quare impedit*, it is *tempus semestre*, i. e. half a year. (b) And for the objection, that where a thing refers to ecclesiastical construction, it shall be according to their law, there can be no one instance shewn to prove such a rule. In *Holcroft's case*, in Michaelmas Term, 32 Car. 2. in the King's Bench, upon the act of uniformity, it was held that the commitment should be but for six lunar months, and the man was discharged.—OBJECTION, that the longest time shall be given to him that right hath, to save his right. ANSWER, the six months for suspension cannot be construed to be calendar months, for that is against their rule to have the mildest sense for the sufferer, and it must be such six months as the suspension was for.—OBJECTION, the case of *Copley v. Collet*, *Hob. 179. Litt. Rep. 19*. That the suggestion to be proved within six months is calendar; *Coke* in his animadversion on that statute, takes no notice of that case or resolution. By this act the party refusing is to be committed for three months; they will agree that must be calendar months only.

S. C. 1 *Skin.* 313.
S. C. 4 *Mod. 94.*
S. C. Comb. 191.
2 *Roll Abr.* 521.
522.
Dyer, 218.
Cro. Eliz. 839.
227.
Cro. Jac. 166.
Yelv. 100.
6 *Co.* 62.
2 *Inst.* 320.
Str. 445. 652.
Ld. Ray. 480.
2 *Mod.* 58.
1 *Com. Dig.*
"Ann." 357.
Dougl. 463.
3 *Term Rep.* 623.

(a) *Co. Lit.* 135. 6 *Co.* 61. *Cro. Jac.* 166. 2 *Leon.* 100. 2 *Roll Abr.* 521. 2 *Inst.* 674. *Dyer* 218.

(b) This construction seems to depend entirely on the statute 13 *Edw. 1. c. 5.* which ordains that in writs of *quare impedit*, &c. if the party recover his presentation

within six months, damages shall be awarded to the half years value; and therefore it hath been adjudged that the computation in this case must be according to the calendar, 6 *Co.* 61. *Cro. Jac.* 141. *Yelv.* 100.

BURTON
v.
WOODWARD.

SIR THOMAS POWIS *contra*. They must be calendar months. Where an act of parliament relates to lay-matters, or laymen, or to all the king's people, there it shall be a lunar month, but where it relates particularly to ecclesiastical persons, there the computation shall be according to the computation of the church and church-men; he cited *Cro. Eliz.* 835. *Dyer* 142. *Co. Lit.* 135, that churchmen go according to this computation, and that our law takes notice of their doing so is no question, 2 *Inst.* 361. If a man be bound to pay money the *first day* of Michaelmas Term, it shall be reckoned the *appearance day*, because commonly known. The statute of Westminster the second c. 4. is "*tempus semestre*," the statute is in Latin, and, in our English statute book, this is rendered "*six months*." My LORD COKE says, * [369] *sex menses tempus semestre*, * 1. E. *tempus sex mensium*, upon 2 *Edw.* 6. c. 13. for proving suggestion six calendar months, 2 *Rolls Abr.* 52. 11 *Hen.* 4. *cap.* 7. *Sid.* 186. According to the almanack there are but twelve months; and in many cases the year is divided into twelve only, *Cro. Eliz.* 227. It seems natural and reasonable that it should be half a year, for the time given was not to thrust them out, but to bring them in, and accordingly to give them time to quiet their scruples; as to that of suspension, that was not intended as a punishment, but as an admonition and warning; all acts of grace are to be construed favourably; this was for their use; then as a penalty it is never to be expounded strictly; when the construction is ambiguous, the most easy and generally received opinion is to be allowed: in *Holcroft's case*, the commitment was for six months; there was nothing enjoined to be done within six months; there was no manner of doubt to him, as there is here, how long he might forbear.

HOLT *Chief Justice*. That computation of lapse we have received from their canon law, and according to their exposition; but here, &c. *Adjournatur.* (c)

(c) It does not appear that any judgment was given in this case; but Skinner 314. reports that the Court seemed ripe to give judgment that the *six months* shall be accounted *lunar months*, and not according to the *calendar*, because though the clause in the 1 Will. and Mary, c. 8. concerns *ecclesiastical persons*, yet there is another clause relating to fellows of colleges who are not ecclesiastical persons, and if it were construed *calendar months* in the one case, and *lunar* in the other, the same word in the same act of parliament would be understood in two different

senses, and HOLT *Chief Justice* inclined very strongly to this opinion notwithstanding the case of *Copley v. Collins*, *Hob.* 179. in which it was resolved that the six months mentioned in the 2^d *Edw.* 6. c. 13. from proof of the surmise in prohibition shall be according to the *calendar*. See vide *Burkdale v. Magal*, 4 *Mod.* 185. where it is said that the computation shall be according to twenty-eight days to the month. See also *Tullett v. Lindfield*, 3 *Eurr.* 1455, where it is determined that a month's time to plead shall be a *lunar month*.

* Easter Term,

* [370]

The Fourth of William and Mary,

I N

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

Symonds against Cudmore.

Cafe 242.

Hilary Term, 1 Will. & Mary, Roll 743.

EJECTMENT upon the demise of *Nicholas Martyn* gentleman; on *non culpabilis* pleaded, a special verdict finds, A. being tenant in tail, with reversion to himself in fee, makes a lease for ninety-nine years, if two lives should so long live, to commence after the determination of a lease for years then in being. A. dies. If B. his eldest son and heir, being the issue in tail, levies a fine, and then the first lease determines, the second lease cannot be avoided either by him or by the devisee of the fine; for the lease being an interest derived out of the estate tail, and also out of the reversion was only voidable by B. as issue in tail, and he, instead of avoiding it, having levied a fine, and thereby extinguished the estate tail, his power as issue in tail is gone; and the devisee cannot avoid it, for he is a mere stranger, who never had any privity in the estate in tail, on which alone the power to avoid the lease depended.—S. C. 4 Mod. 1. S. C. Salk. 338. S. C. Skin. 284. 317. 328. S. C. 3 Salk. 335. S. C. Carth. 257. S. C. 12 Mod. 32. S. C. Holt, 666. S. C. 1 Freem. 503. 2 Ath. 204. 3 Bac. Abr. 324. Cruise on Fines, 275. 4 Brown P. C. 594. Cowp. 379.

Bb 3

That

SYMOKES
v.
CUDMORE.
-o-

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That *Sir Nicholas Martyn* was seised of the premises in fee, and that he at *Exon* by deed indented *ult.* August, 23 *Car.* 1. in consideration of a marriage then to be had between *William Martyn* his son and heir apparent, and *Elizabeth C.* and a portion with her; covenants with *J. L.* and *S. L.* that before the end of Michaelmas Term following, he would levy a fine, or by other conveyance, assure the premises to the said covenantees, and their heirs, or such as they should nominate to be joined, to the use of *Sir Nich. Martyn* for life, remainder to the said *William Martyn* in tail male, remainder to *Sir Nicholas* in tail male, remainder to the right heir of *Sir Nicholas*, PROVISO, that it should be lawful to *Sir Nicholas* during his life, and after his death to *William Martyn*, and the heirs males of his body at their will and pleasure, to make any lease or leases of any part then in demise, or usually before that time within twenty years, accustomed to be let to any person or persons whatsoever, as well in reversion as possession for twenty-one years or three lives, or for any term or state whatsoever, not exceeding three lives or years determinable on three lives, *ita quod* the ancient and accustomed rent be reserved, or more, and *ita quod* no one tenement or thing be at any time estated or charged with any larger * or longer estate or term than for twenty-one years, or three lives, or any number of years determinable on the death of three persons at the most.—That afterwards, on the first of September, 23 *Car.* 1. *Sir Nicholas Martyn* made a lease for years, and a release to the uses; and under the limitations and powers in the first indenture mentioned; that by virtue of these indentures *Sir Nicholas* became seised for life, remainder to the said *William Martyn* in tail male, &c; that the said *Sir Nicholas* had issue the said *William Martyn* his only son and heir; that the said marriage was solemnized; that the said *William Martyn* and *Elizabeth* his wife had issue *Nicholas Martyn* the lessor of the plaintiff; that on the 14 March, 23 *Car.* 1. *Sir Nicholas* by indenture demised to *Clement Westcombe* the house in question, HABENDUM from the aforesaid 14th day of March for ninety-nine years, if *Elizabeth*, *Richard*, and *Nicholas Westcombe* should so long live, rendering 8 l. 10 s. rent *per annum*; by virtue whereof *Clement* entered and continued possessed until the 10th of May, 1689, on which day *Richard Westcombe* died; by whose death the lease made to *Clement* was legally determined, and not before; that some time after the demise to *Clement*, *Sir Nicholas* died seised of the reversion, and *William Martyn* became seised of the reversion; and that he being so seised, on the 6 October, 1654, reciting the lease to *Dr. Westcombe* for years determinable on the life of *Elizabeth*, *Richard*, and *Nicholas Westcombe*, under the said rent of 8 l. 10 s. did for twenty-one years release 8 l. of the said annual rent, and leased, and to farm lett (*si lex in hoc casu sic postulat*) the said house to the said *Elizabeth* for ninety-nine years after the legal determination of the before recited estate then in the same being, if *George* and *William* should so long live, rendering the rent of ten shillings; that *Elizabeth*, *Richard*, and *Nicholas*, were then, and long afterwards in life;—That *William Martyn*, 4 April, 1662, died seised of the reversion aforesaid, and after his death, the said *Nicholas* the lessor of

of the plaintiff became seised of the reversion; that during the lease to *Clement Westcombe* and before the determination of it, viz. in the 27 Car. 2. *Nicholas Martyn* levied a fine *sur consance de droit come ceo*, &c. to *Sir John Carew*, and others, with proclamations to the use of the said *Nicholas Martyn* in fee; that the lease of *Sir Nicholas* to *Clement Westcombe* did, on the 10 May, 1689, determine by the death of *Richard Westcombe*; that the lease made by *William Martyn* to *Elizabeth Westcombe*, was *debita juris forma* assigned to *Cudmore*; that he by virtue thereof entered; that *Nicholas Martyn* entered on him, and made the demise in * the declaration mentioned to the plaintiff, who entered and was possessed until the defendant entered and ejected K. &c. *et si pro quer. pro quer. et si pro def. pro def.*

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SHOWER for the defendant. THE CASE in short is thus: A. being tenant for life, remainder in tail to B, the eldest son and heir of A, remainder in tail to A, remainder in fee to the right heirs of A, with power for the tenant for life, and the remainder man and his issue in tail, to make leases, A. makes a lease pursuant to the power, and dies: while that lease is in being, B. the remainder man in tail, makes a lease for years, rendering ten shillings rent to commence after the determination of the first lease. B. dies leaving issue *Nicholas Martyn* (the lessor of the plaintiff) heir to the entail: *Nicholas Martyn* before the commencement of the second lease, or the determination of the first, levies a fine *sur consance de droit come ceo*, &c. with proclamations to the use of himself in fee-simple; the first lease determines; the second lessee enters; the lessor of the plaintiff enters upon him, &c.

THE FIRST QUESTION in this case is whether this lease be agreeable to the power; and if so, then there will be an end of the case?

SECONDLY. Admitting that against me, *First*, whether this lease be not void in its first creation: *Secondly*, whether it be not void by the death of the then tenant in tail who made it, or voidable only; and *Thirdly*, if now voidable at all after the fine levied by the issue in tail?

AS TO THE FIRST QUESTION I will just put the case, and submit it. The power is, to make any lease or leases of any part of the premises usually demised in *possession*, or *reversion* for twenty-one years or three lives, or any number of years determinable on three lives, so that the thing to be leased be not at any time stated or leased for any longer or larger term or estate than three lives, twenty-one years, or other number of years determinable on three lives at the most, rendering the usual rent, or more. Now taking this power according to the words, the lease is not repugnant, for it is to be in *possession* or *reversion* at the will and pleasure of the tenant or issue in tail, so that no one estate or lease be for above three lives; now here is no one estate for more; here is one in possession for three lives, and one in reversion for two: the meaning might be, that he might make a lease in possession for three lives, and the like in reversion for three, but neither for more;

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and if it be construed that all together should amount to no more in reversion as well as possession, then those words "in reversion" would * be in part useless: but this seems hard to justify, so I waved it, and argued the other.

THE SECOND QUESTION, If this second lease be good and valid, though not pursuant to the power. And to make it appear so, I insist on three things.

First, That when tenant in tail makes a lease for years, rendering rent, and dies, such lease is not determined by the death of the lessor, or the descent of the estate tail on the issue, but remains in force till avoided by the entry of the issue. *Secondly*, That if, before such avoidance, a fine be levied, and the estate tail either barred or extinguished, such lease becomes thereby indefeasible; and that, *thirdly*, there is no difference as to this respect between our lease, and that of any other lease: that a lease to commence at a future day, stands in the same plight *quoad* the issue, especially as our case is, being made by tenant in tail remainder in fee to himself.

First, When tenant in tail makes a lease for years, rendering rent, and dies, the lease does not thereby become void, but the issue may avoid it or not at his pleasure: this I know will be agreed to me; but I must pray leave to enforce, and a little to illustrate the reason of it, because the same reason will be applicable to the lease in years, as I shall evince presently: the difference is between a charge and an interest with recompence. It is true, if tenant in tail grant a rent charge, or the like, when he dies it is determined, because as he has not (since the statute) a power of alienation; so neither can he clog or incumber the land or the estate to the damage of the issue, for that would intirely evade the force of the statute *de donis*, &c. Now the very reason why such incumbrance becomes void by his death, *viz.* benefit of the issue, is the very reason why a lease for years, rendering rent, is not so void, but only voidable; the one is clearly at first sight an apparent mischief to the issue; in the latter case, the recompence by rent makes it doubtful, whether the lease will prove so or not, because perhaps the rent may be of more value than the land; and if so, then the issue (for whose sake the statute *de donis* was made) may be advantaged by such lease, and consequently it is unreasonable that the law which was designed for his benefit, should be construed to turn to his mischief; and this is the true reason of his privilege to elect, because it stands indifferent, whether beneficial or mischievous; and perhaps the rent (though of lesser value) may be of more advantage to the issue, than the land, as his father thought before him, because of the distance of the land from his habitation, or the like: whereas in the other cases of charges, there is no *quid pro quo*, nothing in lieu or recompence for the loss. This difference upon this reason is agreed in the case of *Smith v. Stapleton*, * (a) which

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(a) *Flowden*, 436.

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I shall put at large anon, and in *Plowden* are cited all the cases to this purpose, which I will not repeat, as *Octavian Lombard's case*, and *Cawxton's* and others: nay, if a rent-charge granted be for the benefit of the issue, it is not void by the death of the grantor; as if tenant in tail have but a defeasible title, a rent-charge granted for the release of all right, shall bind the issue for ever, because apparently for his advantage, that grant preserving to him the estate: so that the difference on the whole is this; where the act of the ancestor is apparently mischievous to the issue, it becomes absolutely void by his death; where it is apparently beneficial, it is absolutely good and binding for ever: where it is indifferent and doubtful, whether profit or loss, there neither valid nor void, but only voidable at election, 1 *Rolls Abr.* 841, 842. *Co. Lit.* 46. *Dyer* 51. and all the other cases admit this.

Secondly.—That leases made by tenant in tail, are only voidable by the issue in tail, while as such. That he may avoid such lease, must be agreed; and the reason why he may avoid it, is the statute *de donis*; it is a privilege given to him by that statute; for before, his ancestor might have aliened after issue, and the alienee might have enjoyed it for ever; much more might he make a lease, rendering a rent so as to bind him: then the statute is designed for the benefit of the issue, and the issue only: this is a power belonging to, and following of the estate tail; and when that estate is gone, the power or privilege incident to it, must of consequence fail. I pray your lordship's consideration of the nature of an estate tail; it is special and particular, and differs from all other estates whatsoever; it is not transferrable as other estates are: estates either in fee-simple, for life, or for years, may, by due conveyance in the law, be transferred, and the party to whom such legal conveyance is made, may, and shall be said to be, and really is seised or possessed of the same estate for quality, as the alienor was; but this is not true of an estate tail; it is personally inherent in the blood and issue of the donee; and therefore before the statute of fines, a discontinuance of it wrought a new and tortious fee; and now by the statute a lawful one; but he is no longer seised of an estate tail: In all pleadings now after this fine, he must alledge himself seised in *dominio suo ut de feodo simplici*. Then for this right of election to avoid or affirm the leases of his ancestors, it is only a power incident to the estate tail, and it is no more, for it is not an incident to the remainder or reversion in fee; for if an estate tail be granted to one, remainder or reversion to another in fee, and the tenant in tail make a lease for years, and die without issue, this lease is void *quoad* the reversioner or remainder-man, as is *Co. Lit.* 46. There if tenant in tail, remainder to his own right heirs (as our case is, and I shall observe more anon) make a lease for years, and die without issue, his heir general cannot avoid this lease; it is only the issue in tail which can avoid it, and as issue in tail, and therefore only while such: now he is become a mere stranger to the estate tail, there remains no longer any privity in him; now the statute was not made for the advantage of the heirs, but only to preserve the estate and inheritance in the blood of

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Hob. 17c.

9 Co. 133.
Hob. 254.
Cro. Eliz 435.
Hargrave's
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of him to whom the gift was made *secundum formam doni*, and so is *Co. Lit.* 19. by COKE from the mouth of SIR WILLIAM HERLE, in 5 *Edw.* 3. 14. and the old books of 3 *Edw.* 3. 2. and 4 *Edw.* 3. 47. which have been cited, that a recovery is given to the blood of the donee, and not to others; and the plea of that statute lies only in their mouths, and no others: this is plain by LITTLETON, *feff.* 363. the intent of the statute was, that nothing should be done to the prejudice of the issue; and my LORD COKE in his comment on that statute, *Co. Lit.* 224. saith, "hereby it appears, that to restrain "tenant in tail from alienation against the profit of his issue, is good, "for it agreeth with the will of the donor, and the intent of the "statute," and a condition annexed to an estate tail, not to suffer a common recovery, is therefore void, because of the supposed recompence: all which proves the issue only concerned; here the conusor now is not privy any way: a fine is a feoffment upon record, and no man can, or ought to make a title against his own feoffment: by the fine he acknowledges a fee-simple in the conusor, and by the proclamations and statute, his issue are barred to say otherwise, and so neither he nor his issue can say the estate tail is in being, or avoid this lease by force of the estate tail, and it must be by force of that, or not at all.—To prove such a voidable lease confirmed by a fine levied by the issue in tail, whether the fine be subsequent to the lease, or before, see the case of *Cudmore v. Bittison*, *Sid.* 62. It was Michaelmas Term 13 *Car.* 2. B. R. on a trial at bar here, and a special verdict waved on that opinion here, though it was offered. *Baron and feme*, tenants in special tail, remainder to the heirs of the husband; they have issue two daughters; they levy a fine to a stranger and his heirs, the husband dies; the *feme* makes a lease for one hundred years, and dies; held to be a good lease, and to continue in force so long as there is issue in tail in being, and that it could not be avoided. *Crocker * v. Kelsey*, in *Jones* 60. *Cro. Jac.* 689. *Bridgeman* 27. at large is direct in this, it is the same case, and as it is 1 *Rolls Abr.* 843, it proves the lease not avoidable by the conusor, because not in of the estate tail, and therefore, says that book, it is good so long as there is issue of the body, and this though the fine were levied by the issue in tail before the lease made by the *feme* mother; and this judgment affirmed on error; and no doubt of this point, says *Rolls*, but only of that on the 11 *Hen.* 7. c. 4. of jointures. As that case of *Crocker v. Kelsey*, is in *Jones* 60, 61, this point of avoiding the lease by the conusor is admitted that it cannot; and then, though agreed that to some purposes the estate tail had a continuance in right *quoad* strangers, yet the lease was not avoidable so long as there was issue, though as to the reversion it would be void, as they there incline; but that is because there the lease was made by the *feme* who had not the reversion in her, as here the lessor had, and I shall shew more presently: now I say there could have been no question on the statute of jointures, but this point must be agreed, that the fine so altered the estate tail, as to make the lease unavoidable, because the lease was good at common law, and the statute *de donis* only aided the issue in tail. As it is in 2 *Rolls Rep.* 490, MASON, in his argument,

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agrees this, that if tenant in tail make a lease for years, and then levy a fine to another, this lease becomes unavoidable: and though that case has been cited on the other side, yet nothing in it can argue for a contrary opinion; for, suppose the estate tail only barred, and not extinguished, yet the estate tail has a continuance only for the benefit of strangers, not to the destruction of their rights; a stranger may say in some cases, that the tail still continues, but never the party himself: and all the cases there put, and all that can be found in the books, where particular estates are drowned, or extinguished, or barred, or altered by surrender, or other act of the parties, though they are said in notion to have a continuance after such acts, yet it is only *quoad* strangers to preserve their rights, never to destroy them: the known case of tenant for life when he grants a rent-charge, and then surrenders, his estate is gone, and absolutely merged between him and the reversioner; but *quoad* the grantee it is still in being: and I know of no particular case, where a particular estate can be said to be in being *quoad* strangers that is gone between the parties: but it is for the stranger's benefit, and not the parties; the stranger shall be admitted to say, it continues in being, not the party: so that if the estate tail be only barred, and not extinguished by the fine, yet it makes not for them; if it be extinguished, * the lessor cannot pretend to avoid this lease; if only barred, it shall not be avoided by him after the fine, and the donee cannot avoid it so long as there is issue in being, by that case afore-cited. In *Bridgeman* 27. it is admitted that if the issue do make a feoffment to a stranger before entry, the feoffee shall never avoid such lease; and there it is taken for a general rule, that the feoffees of tenant in tail, and all that come to the land under the tenant in tail by any assurance made by him, whereby the estate tail is barred, or discontinued, shall have held the estate charged with the leases and charges made by tenant in tail: and the same law is for those, that come to the land under the tenant in tail, though the estate tail remains not barred or discontinued (except the issue in tail who are helped by the statute *de donis*) and therefore if tenant in tail, make a lease for years, the *feme* shall hold it charged, so shall tenant *per courtsey* of a *feme* tenant in tail; and tenant for three lives warranted by the statute of 37 Hen. 8. c. shall not avoid such leases; and the reason is, because the statute *de donis* doth not aid them, as it doth the issue. The case in 6 Eliz. *Dalison* in fine *new Bendl*. 65. is strong: *feme* tenant in tail made a lease for twenty-one years and after takes husband, and they have issue; she dies; her husband being tenant *per courtsey* surrenders that estate to the issue in tail; held, that tenant by courtsey could not avoid that lease, nor could the issue during life of tenant *per courtsey*, because so long he should be said to be in of that estate. It is true, *Moore* 8. seems otherways; but 4 Leon. 200. is according to *Dalison's Report*, and the same is in *Owen* 83. *Poutrell's case*. OBJECTION, *Sir Thomas Wiatt's case*, *Dyer* 107. 115. Tenant in tail, reversion in the king; he makes a lease for years; tenant in tail is attainted; the king being in of the reversion, shall avoid the lease. But I ANSWER, The reason there was, because the king could not have

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See Dyer 51.
Bedford's case,
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have two fee simples, one as donor, and so he had the reversion; the other by the attainder as determinable on death without issue; but held there, that if the king had had the estate tail as forfeit by act of parliament only, he should not avoid leases made by the tenant in tail: there the king became seised of the reversion by act in law, viz. the attainder; here is an act done by the issue himself: this is rather like to the case of the *Lord Aberganey*, 6 Co. 78; two jointenants in fee, and one grants a rent-charge in fee, then releases to his companion, he shall never avoid that grant, because he came to it by his own act, viz. acceptance of the release, and not *per jus accrescendi*; and so by acceptance of the release, he hath deprived himself of the benefit and * means of avoiding the charge of his companion, which he might have had by the survivorship.—OBJECTION, *Sir George Brown's case*, 3 Co. 51. that in case of a lease made by *feme* tenant in tail for three lives contrary to the 11 Hen. 7. c. of jointures, the alienee by fine from the wife, might enter and avoid such lease. ANSWER, That is true, but consider the reason of it, and it makes for me; that judgment was founded merely on the words of the act, “to whom the incontestable title or inheritance appertains, &c.” but it is there agreed, that otherwise, and by the common rules, he could not, for a right or title of entry could not be transferred, and the donor could not claim against his own fine. OBJECTION, *Co. Lit.* 46. The feoffee shall have the same election to avoid or affirm as the issue. ANSWER, that cannot be law, nor doth the authority there cited justify it, *Plowd.* 437. for it is only said by the counsel *arguendo*, and put with a “and peradventure” for the disallowance, which COKE omits: besides, the feoffee is in of a tortious fee; and so is the text of master *Littleton*, *sect.* 599. And then by consequence he can no more avoid the lease, than a *disseisor*; but by that very case, it supposes an entry by the issue in tail, which plainly proves, that a mere descent doth not make it void; however an *actual* entry doth undoubtedly avoid it, and that is true, and further not: and *Rolls* in his 1 *Abr.* 842, where he has this of *Coke's*, adds *quære ceo*. OBJECTION. The case of *Opis v. Thomson*, 1 *Sid.* 260. 1 *Keb.* 788. 910. ANSWER. There never was any judgment in that case, and as it is mentioned in 3 *Keb.* 109. 197. it doth appear so. Then the case of *Smith v. Stapleton*, *Plowd.* 436. is in truth a full and direct authority, that such lease made by tenant in tail, may, after the death of tenant in tail, become unavoidable by a fine with proclamations, otherwise there could have been no argument nor judgment that the lease was unavoidable; for if after the proclamations, and a barr of the estate tail, the same election remained as before, those other points there could never have been in doubt; as whether the lease should bind and be unavoidable, which was raised on the grant and remainder in the life of tenant in tail by the proclamation coming afterwards: if the estate tail be extinguished then I take it to be clear, that the lease is unavoidable; if only barred, it's continuance is, and can be only for the benefit, not the mischief of strangers; but by and by I shall, I hope, prove it extinguished, as this case is.

Thirdly,

* *Thirdly*, Then whether there be any difference between this, and the common case of a lease for years by tenant in tail; if our lease now in question be not in the same plight and condition, as any other: and with submission, it is the same in all respects with a term commenced, for it is neither void in its creation, nor void by the death of tenant in tail, nor voidable by the consuee of the fine, any more, or otherwise than another term. It is not void in its creation, for whatsoever may by any possibility take effect, and have its full force, can never be said to be void; now this future lease might have commenced in the life-time of him that made it by the determination of the former lease; for no man can say, it would have been invalid with respect to the tenant in tail himself, and consequently not void in its creation: it is nothing like a lease made to begin after death, for there perhaps it may be said to be so, because only a charge or incumbrance on his issue, and none upon himself; the law restrains him from prejudicing his issue, which that apparently does, for he himself agrees it inconvenient, because it doth not charge himself: it is like the case of a warranty, in *Co. Lit.* 386. where, the heir shall never be bound by an express warranty; but where the ancestor was bound by the same: the same if a man bind his heirs to pay a sum of money, this is void, and so agreed in the case of *Oates v. Frith*, *Hob.* 130; that no man shall charge his heir, but as part of himself, and so begin with himself; and for that reason a contract concerning his land, which should otherwise go to his issue, shall not bind, because not bound himself. But even that case of a lease commencing *post mortem*, is but MANWOOD's opinion in *Dyer* 279; and CATLIN *Justice* denied it to be law; but however, taking it for granted, it cannot affect our case; for the reason of MANWOOD was, and only could be, because it could not take effect *in esse* from the possession in the life of tenant in tail; there the issue claims paramount the lease, and becomes seised of the estate tail *per mortem secundum formam doni*, which is before the commencement of the lease, for that is *post mortem*, and could by no possibility attach in possession till then. But, a future lease, though it be not of the same validity and force to all intents and purposes as one in possession, yet it is as to those respects we are now considering: it is esteemed in law as an interest, and as an interest assignable; it is not as a mere chose in action, for that cannot be assigned; it is not as a mere possibility, for that cannot be barred, as is in the case of *Pell v. Brown*, of an executory devise; this is forfeitable as other estates, and may be surrendered or extinguished by acts done on the land, or which touch the realty, though in some cases in a different manner * than some other particular estates: it is an interest here issuing out of the estate tail in possession, for it might have attached in possession in his life-time. Besides, here it is under the same respects *quoad* the issue, as a term commenced; it is with a recompence by rent; and consequently only voidable, not void, for the same reason as any other lease; the quantum is not considerable in the eye of the law, and therefore its petiteness is no objection, for the issue if he had thought the land better in value, or more eligible in any other respects, might have avoided it by

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6 Co. 33.
10 Co. 95.
Cro. Jac. 579.
Hob. 130.
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entry: there is no rule or measure in the books, how much or how little shall, or shall not do in any case; if a rent, it is enough, because of the election. As this case for the point of recompence, so for the point of futurity is comparable to others where the law gives election, as leases made by *feme covert*s, infants, or other persons under like disabilities, their leases (if without render) are void; if with render, are only voidable by disagreement when the disability is removed; so is the case of *Smalman v. Agborow*, *Hutt.* 102. and *1 Rolls Rep.* 441. Now those may be compared to this of tenant in tail, which is under protection of the statute, as they are under the care of the common law. Suppose a *feme covert*, or an *infant*, make a lease to commence at *Michaelmas* next, with a render of rent, and before that day the disabilities are removed, surely acceptance of the rent (after such time) will make them good: yet if void, it could not; the same here: and as I said before, the protection of the statute *de donis* is not for the sake of tenant in tail, but his issue; for upon the most strict construction of it, he may alien during his life: and therefore this lease can never be void *ab initio*, because it is consistent with the estate tail; for notwithstanding those two successive leases, he continues still seised of the estate tail, and that *secundum formam doni*, both freehold and inheritance remained in him still; this cannot be denied me; so is *Co. Lit.* 334. therefore not void: besides, there is not one reason why a lease for years commenced with render, may be affirmed or avoided by issue in tail, but what will reach this case; the two reasons assigned are, that an interest passes, and a rent is reserved; here are both. This rent shall (by opinion of law) follow the reversion, and that proves this future lease sounds not merely in contract, but in estate too: In *Brierton v. Evans*, *1 Rolls Abr.* 294, the case was, a man makes a lease for life, and afterwards makes a lease for years to commence after the death of lessee for life, rendering rent, and then levies a fine of the reversion to remain to * him and his wife, then dies, the lessee for life dies; the *feme* in reversion shall have debt against this lessee for years for rent incurred after the death of the tenant for life, though the lessee for life or years never attorned, and the lessee for years could not attorn, because he had only a future term at the time of the fine levied; and yet adjudged as before; which shews that the rent shall follow the reversion. The case of *3 Cro.* 718. *Pledger v. Lake*, is very strong to prove the regard, value, and consideration, which the law hath of, and for a future term; that the law regards it as a term and interest, though future: tenant for life, remainder in tail, he in remainder made a lease for years to commence after the death of tenant for life; tenant for life afterwards suffers a common recovery, with voucher of him in remainder in tail, and dies: the question was, if this lease were destroyed and gone; and all the justices held it in the negative, and that such lessee might well falsify such recovery both at common law, and by the statute of 21 *Hen.* 8. c. 15. Though a release cannot be made to such lessee of a future term *pur increaser del estate*, yet he is capable of a release of the rent by reason of the privity between them, and he may assign it, or if he do not, it shall go to his executors,

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Co. Lit. 46. Such an interest is capable of a confirmation; and so is it exprest in *Moore* 66. *case* 180, where a bishop makes such a future lease, to be confirmable by the dean and chapter: and the case of *Bayley v. Moore*, 3 *Keb.* 109, 196, 197. is so imperfectly reported, that its authority cannot contradict this: it is true, it is otherwise of a lease made by a disseisor to commence at a future day, *Co. Lit.* 296. though the year-books there cited do not warrant it; but yet supposing it so, that is upon another reason, because all the estate of the disseisor being tortious, nothing but possession capacitates him himself to take a release, and consequently no interest derived from him can do otherwise without possession too. A future lease to commence at a day to come, made by tenant in tail, if pursuant in other respects to 32 *Hen.* 8. is good even within that law; and so is *Dyer* 246. by the better opinion there; and in the margin there, is cited a case of *Thompson v. Trafford*, the report is in *Poph.* 9. and 2 *Leon.* 188. Ancient lease warranted by the statute, is good, though to commence at a future day; and if so, there is the same reason why, such lease not warranted by the statute, should be only voidable, as the other would have been if the statute had not been made; but what is more than all this, to prove the consideration of a future lease to be the same as one in possession, is the case * of jointenants, in *Coke upon Littleton.* (b) If two jointenants be of a term, and one of them grant to J. S. that if he pay to him ten pounds before *Michaelmas*, that then he shall have his term; the grantor dies before the day; J. S. pays the sum to his executors at the time required; yet he shall not have the term, for it was but in nature of a communication; but if he had made a lease for years to begin at *Michaelmas*, it should have bound the survivor: but otherwise of a rent-charge, common, estovers, or the like, they shall not bind the survivor; for the sake of two maxims, *jus accrescendi preferitur oneribus*; and another *alienatio rei preferitur juri accrescendi*: so that by *COKE* it is plain, that such *interesse termini* amounts to an alienation, and is not a mere incumbrance: of the same mind is *LITTLETON* himself afterwards, *sect.* 289. "If two jointenants be seised of certain lands in fee simple, and the one letteth that to him belongeth, for a term of forty years, and dies before the term commences, the lessee may enter and occupy the moiety to him leased during the term, &c. albeit, the lessee never had possession in the life of the lessor by force of the lease." And he goes on, "the diversity is between the grant of a rent-charge and years; in the grant of the rent-charge by one jointenant, &c. the tenements continue always as they were before, without this that any one hath right to have any parcel of the tenements, but themselves, and the tenements do continue in the same plight as they were before the charge; but where a lease is made by one jointenant to another for years to commence at a future day, the lessee immediately hath right to all which his lessor had for the term leased;" this needs no paraphrase, these are his words; and prove clearly that our lease passed an interest; accordingly is the case of *Whitlock v. Horton*, *Cro. Jac.* 91. Ejectment; special verdict; two join-

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(b) Page 185. section 286.

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(a) But FEN-
NER Justice was
of a contrary
opinion, and
therefore the
case was ad-
ourned.

b) Moor 742.

tenants for life, one of them grants, that J. S. shall hold and enjoy the whole after the death of her companion; held ill, because she could not contract for the land of her partner, because she had no right therein, but there resolved, that as to her own moiety, it was a good lease to charge and bind her companion, if she had survived her; that if two jointenants for life, and one make a lease to commence after his death, it is good to bind the companion; and the same with a present lease, for the future day of commencement makes no difference, says the book. The case of *Wood v. Reynolds*, *Cro. Eliz.* 764. 854. is full in this point. Ejectment, special verdict. *Sir John Ruffel* seised in fee, by indenture covenants in consideration of marriage, to be had, to stand seised to the use of himself and his heirs till marriage, and * after to the use of himself and *Dame Ruffel* for their lives and the heirs of his body on her, with remainder over; afterwards he lets the land for a term of thirty-one years, to commence after the determination of a former term; afterwards the marriage took effect; the first term expires; *Sir John Ruffel* dies; the lady enters; and argued, that her entry was lawful, and that this future lease could not bind or bar the contingent use: all held, it could not bar the contingent use, because the freehold and inheritance continued as it was unchanged, (so here) but all held, that this lease (though thus future) should bind, for a *cestuy que use* should not at common law avoid a lease made by the feoffees upon a good consideration; this lease though thus future being made out of the estate in fee, from whence the use arised, shall bind it; and *POPHAM* said he had conferred with the justices at Serjeants Inn, and that they were of the same mind (a) the case of *Ligh v. Burton* (b), in the Court of Wards in Hilary Term, 43 *Eliz.* cited in *Cro. Eliz.* 765. is stronger, that such lease shall prevent the rising of a contingent use; but yet they all prove no real difference between a lease to commence in *futuro* and another, that the one passes an interest as really as the other. The case they insist on so much out of *Coke*, which I mentioned before, *Co. Lit.* 46. proves, that there is no difference, for there he puts it thus; if tenant in tail make a lease to commence ten years hence rendering rent; tenant in tail dies; the issue enters and makes a feoffment, and then the ten years expire; now may the feoffee have election, as he saith, to affirm or avoid? This proves what I now contend for, that this lease passes an interest. It may be objected the case of *Sir Marmaduke Wyndel*, *Hob.* 45. where tenant in tail of an advowson, and his son and heir joined in a grant of the next avoidance; tenant in tail dies; and held to be a void grant against the son and heir. I answer that no ways affects or governs our case at all, because the issue in tail could not be bound by his own concurrence, because he had nothing in it at the time of the grant, neither in right nor possession, nor could it bind him as a grant of his fathers, because no recompence by rent, and for want of that, it was void as the father's grant; and such is the resolution in the case of *Bowles v. Walter*, 1 *Rolls Rep.* 190, where tenant in tail of a manor, to which an advowson was appendant, grants the next avoidance and dies, and the issue enters into the manor, the grant is void; because it is a thing which

which lies in grant, whereof no *formedon* lies; and there is no rent reserved upon it; these are the reasons of the book: but further, COKE there puts our case * and gives it for us: tenant in tail grants a lease to commence at Michaelmas rendering rent, and dies before Michaelmas; the issue enters into the residue of the land descended; yet he may make this lease good by acceptance of rent after Michaelmas, because his election was not come before: This is the same, 1 *Rolls Abr.* 843. and is a direct opinion, that such lease is not void *quoad* the issue, but only voidable, for otherwise no acceptance could make it good: the case of *Errington v. Errington*, 2 *Bull.* 42. is a full proof of this, for there is no question made in the whole case about the futurity of the lease, but only whether the issue in the life-time of the mother could charge the estate tail with such a lease, and COKE and all agreed the reversion charged. This brings me to my last point, in which the case is thus. Tenant in tail, remainder to his own right heirs, makes a lease rendering rent to commence at a future day, and dies before that day happens, the issue levies a fine before entry; if he can avoid this lease? Suppose tenant in tail had died without issue male, and so the estate tail had been spent, could his brother or heir general have avoided this lease? Surely no; then I say *Errington's case* is a direct authority for me: *baron and feme*, tenants in special tail, remainder to the right heirs of the husband; they have issue; the husband dies; the issue in the life-time of the mother makes a lease to commence after the death of the mother rendering rent; then dies; the reversion descends to *Jane Errington*, who before entry or acceptance levies a fine; the question was, if the lease was good; and by WILLIAMS, FLEMING, and CROKE *Justices*, the conusee could not avoid the lease; and the reason was, because the estate tail was gone, and the conusee, not being privy to that estate, could not avoid the lease; they who argued for the defendant would have it, that the lease did not charge the estate tail, but only the reversion, the issue at the time of making it not being seised of the estate tail, but only had a possibility, and then, the estate tail being only barred, the conusee should hold it clear, till death without issue; but the then Court held the estate tail gone by the fine, and the conusee in of a fee out of the reversion, and so the lease good; then comes COKE, and he holds, that the issue had only a possibility, and so the lease was void *quoad* the estate tail, and consequently, so long as issue was, the conusee should hold it clear, for that the lease had its operation by way of interest only out of the reversion: now both these make our case plain; they both agree that it passed an interest of the reversion; they both admit, that if he had been seised of the estate tail at the time, and * so the estate tail had been charged, and then a fine levied, and thereby the privy destroyed, no body could avoid the lease; the counsel and judges that argued for the defendant, do not any of them contend, that the conusee had election to avoid, but only that the lessor not being seised of the estate tail when he made the same, the estate was not charged, and so that estate, if it continued, the lease could not take effect during its continuance, and that it had continuance, because it was only barred by the fine; and

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CROKE *Justice* agrees that, if made by one in possession of the estate tail, and then a fine, it was a bar and the lease good: now here the lessor was actually seised in fee tail when he made this lease, and consequently it must charge that possession in point of interest; then by the same case it is agreed that it issues also out of the reversion in point of interest too. If the first lease had determined before the estate tail had been destroyed by the fine, this lease had certainly taken effect, for that estate tail was charged by the cases I have cited; then that being barred, the privity to that estate tail is so far gone by the fine, that none can say it hath continuance to the prejudice of a stranger, and consequently it must be a good lease so long as the issue are in being by the opinion of CROKE *Justice* and them: if the estate tail be extinguished, it charges the reversion, and is become unavoidable: now here the reversion being in him that levied the fine, the estate tail is extinguished; and the difference put by MR. JUSTICE JONES, in his argument in the case of *Godfrey v. Wade*, Jones 32, 33. and agreed by the counsel at the bar reaches this; that fines levied by the issue in tail in the life of the ancestor (having no estate) if it be to one that has nothing in the land, work only by way of conclusion against him and his lineal issues, and those who claim in *the post*, but not against those who have an *elder title*, as *Capel's case*, (c) and *Archer's case* (d) are: but if the party who levies the fine hath the reversion, or if he levies the fine to him that hath the reversion, there the fine operates by way of discharge and extinguishment of the estate tail, and the consor shall be in by force of the reversion discharged of the estate tail; and this is the third resolution in *Sir George Brown's case*, (e) that there being such a reversion, the estate tail is extinct; and like to it is the *case of Hussy* cited in *Altonwood's case*, 1 Co. 49. (f) where was tenant in tail, reversion in the king, and the tenant in tail by deed inrolled grants to the king, and then the 34 Hen. 8. c. 21. was made, by which the tail was barred, and then the king grants it in fee; and held a good grant, for he had but one fee, and that was by force of the reversion. If * tenant in tail do bargain and sell, and levies a fine to the reversioner, in this case the estate tail is extinct, and the bargainee shall be in of the reversion discharged of the estate tail; *pari ratione* it must be so here: and consequently our lease is good and indefeasible; and judgment ought to be for the defendant.

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LEVINS *Serjeant* on the other side argued for the plaintiff, that this is a voidable lease, and that the consor of the issue in tail may avoid it according to *Co. Lit.* 46; that the reversion is not happened; that the estate tail remains in him though the issue are barred to say so by the statute; that the estate tail is only barred, but not extinguished; and cited *Capell's case* (g), *Bruden's case*, (h)

(c) 1 Co. 61.

(d) 1 Co. 66. 1 Eq. Abr. 281. Cro. Eliz. 453. 2 And. 37.

(e) 13 Co. 51. Cro. Eliz. 514. Moor 455.

(f) Jenk. 251. 2 And. 154.

(g) 1 Co. 61. Poph. 5. 3 Bull. 52.

(h) 6 Co. 1.

and

and *Beaumont's case* (i), and many other cases, wherein it is held that the estate tail is not extinguished.

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HOLT Chief Justice. It will be hard to make it so far to have a continuance, as to prejudice the interest of a stranger, especially the reversion being in him.

Curia advisare vult. (k)

(i) 9 Co. 138.

(k) In Hilary Term, 4 and 5 William and Mary, the judges delivered their opinions *seriatim*. See S. C. Skin. 328 to 333. and judgment was given for the defendant, S. C. 4 Mod. 4. EYRE, GREGORY, and DOLBIN *Justices*, held that the *issue in tail* had election to avoid or affirm the lease; but that the *conusee* of the fine had not; but *HOLT Chief Justice* differed upon this point,

for he held the lease actually void as to the issue. S. C. 1 Salk. 338. S. C. Skin. 330. he differed also upon some other collateral matters, which see, S. C. Carth. 257. S. C. 12 Mod. 32. but he agreed with the other three judges, that judgment should be given for the defendant, S. C. Holt, 666. but in S. C. 1 Freeman. 504. it is said to have been thought a hard case.

Farrers, on the Demise of Upton, against Miller and others. Case 243.

Hilary Term, 3 William and Mary, Roll 693.

EJECTMENT by bill in the King's Bench: wherein the plaintiff declares on the demise of *John Upton* for a messuage, twenty acres of land, ten acres of meadow, and ten acres of pasture, with the appurtenances in *Brenchley* in the county of *Kent*. The defendants by *Arthur Lake* their attorney, *ven' et dicunt quod tenementa præd. cum pertinentiis tenentur de THOMA CULPEPPER baronetto ut de manerio suo de AYLEFORD in com præd. quod quidem manerium est, et a tempore cujus contrarii memoria homin' non existit fuit, de antiquo dominico coronæ domini regis et dominæ reginæ, quodque tenementa præd. cum pertinentiis a toto tempore supradicto placitat' et placitabilia fuerunt per parvum breve domini regis et dominæ reginæ de reſto in cur' manerii præd. secund' consuetud' ejusdem manerii præd. et non alibi; et hoc paratus est verificare prout curia hic consid' unde non intendunt quod cur' domini regis et dominæ reginæ hic placitum inde cognoscere vellet, &c.*

—The plaintiff demurs, and shews for cause quod præd. defendentes in placito suo præd. defendere debuer' vim et injur' ad seipos perinde partes huic actioni faciend' sine qua defensione vis et injur' nec hujusmodi placitum nec aliquod placitum quodcunque sive dilatorium sive aliud est bonum seu placitabile. The defendants join in demurter.

In ejectment, if the defendant *venit et dicit* that the lands were ancient *demesne*, he need not add *defendit vim et injuriam suam*, for although that is not a full defence, yet the plea, being received, is good; but the plaintiff might for this omission, have refused to receive it.

S. C. Salk. 217.
S. C. Carth. 220.
S. C. Holt 219.
S. C. 12 Mod. 21.
3 Lev. 182.
1 Brownl. 57.
Dyer 157.
Cro. Eliz. 826.
Styles 273.
Lutw. 7.

• I ARGUED for the plaintiff that the plea was ill, because here is no defence at all. (a) It is necessary; for he ought to make himself party to the suit, and he must make himself so by this defence of the *vim et injuriam*, before he can plead any plea at all: if the plea be

(a) Co. Lit. 127.

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in disability to the plaintiffs person, as "*villenage*," he must say *defendit vim et injuriam*, and so is *Lit. Sect.* 197. It is true, he is not to make a full defence by an "&c." for that implies *ubi et quando et quomodo cur' consideraverit*, and so affirms the jurisdiction (b), but the other he ought to use. In *Bro. tit. "Defence,"* 8, trespass for corn, and the defendant defends the force and injury, and demands judgment *si curia cognoscere vellet*, &c.; so that, says the book, he shall defend the force and injury when he pleads to the jurisdiction; and *Placito* 9 and 11. are the same; (c) and further note, that in *offize*, *scire facias*, defendant need make no defence. *Brook, Pl.* 12. is express, that he who pleads to the person shall defend *vim et injuria*, though he shall not say *quando*, &c. the same, *Plac.* 21. If full defence be made, he cannot plead to the jurisdiction, because that did affirm it, *Bro. "Defence,"* 4. Detinue of charters, *defend' vim et injur' et non plus*, and then pleads to the jury, *Pl.* 5. is *ancient demesne* pleaded, and defence of the force and injury: it is true, it is not necessary in demand of *conuissance*, because he is no party, *Dyer* 157. And in truth, where nothing in certain is demanded, but the writ is general, no need of defence, as in *Dower*, &c. But in all actions where process of outlawry lies it is necessary: this is the ancient form of pleading, and the want of this we have shewn for cause.

E CONTRA was urged, that it is sometimes with it, and sometimes without it, and in *Rastall* are several precedents without it, and in *Arden's case*, 5 Co. 105, the record is without it.

To which I ANSWERED, that that case is reported in *Cro. Eliz.* 826; and there it appears that ANDERSON was absent, and only WALMESLEY and KINGSMILL held it a good plea, and WARBURTON *e contra*, and there is no judgment in it, for the demurrer is waived, and the defendant afterwards pleaded the general issue; which shews the contrary rather, and this never stirred in; now we have demurred and shewn it for cause.

PER CURIAM. Here is no need of defence, for the plea is a good plea without defence. The precedents are both ways, but you are not bound to receive the plea without it; as in case of outlawry it should be *sub pede sigilli*, and you are not bound to receive it without it, but if you do receive it, it is good without it.

A plea that lands are held as of such a manor; and have been always ancient demesne is good.

Then I URGED that it should be "*placitabilia sunt.*" *Brownl.* 57. is "*sunt*" and so is *Bro. Abr. "Ancient demesne,"* 2. and always thus pleaded. BY THE COURT "*tenentur*," implies the rest and well.

Judgment for the defendant.

(b) Co. Lit. 127. 197. Lutw. 9. Gilb. C. B. 188. 1 Vent. 334. 4 Bac. Abr. 35.

(c) See 1 Ld. Ray. 117. Bayley's edit. note (a) where it is said to be now settled

that in all *dilatory pleas*, except such as go to the jurisdiction, a full defence must be made. Per BULLER Justice in the case of Thompson v. Stockdale, Hilary Term, 23 Geo. 3.

Bull

* Bush against Calis.

Case 224.

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COVENANT. The declaration sets forth an indenture of demise of a messuage or tenement *cum pertinentiis*, except two rooms over the hall, and except a passage or entry as then divided, and liberty to wash in the kitchen, and also free passage in, through, and over the said hall, kitchen, &c.; that the term by mean assignments came down to the defendant; that at the time of the demise, there was a passage or entry between the hall and kitchen, in, by, and through which they used to go to the kitchen, &c.; that the defendant evicted the said entry or passage by erecting of a partition, *et sic infregit conventionem*. The defendant demurs; and the plaintiff joins.

On a covenant in a lease excepting an entrance with liberty to wash in the kitchen, and a passage for that purpose, an action of covenant lies against the assignee for hindering the lessee his passage.

S. C. 12 Mod.

24.

S. C. Carth.

232.

S. C. Salk. 196.

Moore 553.

Cro. Eliz. 657.

March. 9.

Comb. 163.

Vent. 26. 44.

Cro. Car. 221.

11 Mod. 170.

12 Mod. 24.

Saund. 321.

Doug. 461.

Espinal's Dig.

350.

I ARGUED for the defendant, That no action in this case lay upon this indenture, for here are no words of covenant, for it is only an exception, and that is only the words of the lessor. I agree that the words "yielding and paying" may, by implication, be construed the words of the lessee, because he is a party to the deed, and the thing imported in those words is an act to be done by the lessee: this is not so, but merely a declaration of what shall not pass: and then being only an exception, *trespass* lies, and not *covenant*, and so would his remedy have been, if I had entered into the chamber excepted: if it be an exception it is not a covenant, for if a grant be of lands, except a close, and an express covenant be to repair the premises, this shall not extend to the close excepted. *Lady Russell's case*, Hob. 276. 11 Co. 50, 51. The case of *Pomfry et v. Roicroft*, 1 Saund. 321. Sid. 431. is stronger; there was a lease of an house except one yard, and the use of the pump therein, and covenant was brought against the lessor for not repairing it, but permitting it to be destroyed, *per quod* he could not use it *secundum formam indenturæ præd*; and held the action did not lie: but the difference in *dame Russell v. Guhwel*, More 553. Cro. Eliz. 657, covenant to enjoy, no breach that THAT was a disturbance in the occupation of certain land excepted out of the demise, because the exception excludes it from the meaning of the lessee to have to do with it, though, says POPHAM, otherwise where a way, common, estovers, or profit *aprendre* are saved or excepted, reaches not to our case; for here the passage, or entry itself is excepted out of the demise, and not the bare use of a way or passage, and consequently *trespass* lies, because as to that we are mere strangers: then, supposing covenant would lie, it will not lie against an assignee, because it is only an implied covenant, * and not express, according to the difference between an express and implied covenant, Cro. Jac. 522. *Waters v. Dean of Norwich*, 2 Brownl. 159, 160. Dyer 257. 1 And. 12. 1 Leon. 179.

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BUT PER CURIAM, without any argument, *e contra*, the action well lies, for it is a covenant only, and the case of the entry is only reserved,

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reserved, and, it concerning the premises, it binds an *assignee*; for it is an express agreement of the parties concerning the house, and that shall bind the assignee.

And judgment was given for the plaintiff. (a)

(a) Vide March 9. Lessee to have *curvum lignum non succiendo arboris, &c.* covenant lies for cutting, &c.; and the case of

Porter v. Sweetman, Styles 406. against an assignee upon an implied covenant. Note to the former edition.

Case 245.

The King against Roberts.

Information for extorting divers sums of money for passage in a ferry *secundum ratam sex denar' pro quolibet homine, &c.* uncertain.

S. C. 4 Mod. 100.
S. C. 3 Salk. 198.
S. C. Comb. 153.
S. C. Carth. 226.
S. C. Holt 363.
S. C. cited Ld. Ray. 475.
4 Co. 41.
5 Co. 121.
1 Vent. 305.
3 Leon. 268.
Cro. Car. 381.
4 Mod. 101.
1 Roll. Rep. 79.
Mod. Caf. 32.
1 Lev. 203.
2 Roll. Rep. 263.
1 Salk. 342.
371.
Stra. 497. 699.
849. 1246.
2 Hale P. C. 182.
2 Hawk. P. C. 322. 332. 336.
3 Com. Dig. "Indictment" (G. 3.)
"Information" (D. 2.)

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INFORMATION in the King's Bench, among the pleas of the crown, against the defendant, that time out of mind there was such a ferry in *Denbighshire*, and that the usual rates for all the time aforesaid were two pence for a man and horse, and one penny half-penny for a score of sheep; and that the defendant such a day was possessed of the said ferry boat, and designing to make unlawful gain to himself, did between that day, and the day of exhibiting the information, extort, take, and receive of divers subjects, divers sums for passage in the ferry boat aforesaid, exceeding the rates aforesaid, *VIZ. Secundum ratam sex denar' pro quolibet homine et equo et quatuor denar' pro quolibet viginti* ANGLICE score of sheep, &c. On not guilty pleaded, and verdict *quoad* the rates for sheep, guilty.

I MOVED in arrest of judgment, that this information is too uncertain: it mentions not what sums were received, but only *secundum ratam*; it mentions not from whom, nor how many times: that no adequate fine could be set in this case, because not said how many score of sheep we took for: we might take only for half a score, or we might take for an hundred score, which would require different fines: in informations and indictments there is so much certainty required as the Court may be able to give a proportionate equal judgment; here every taking is a several offence: here *non constat* how many offences. In the case of *Rex and Goldston v. Whidder*, indictment for ingressing *diversos cumulos grani tritici*, ill, because uncertain. Upon an indictment 5 and 6 *Ed. 6. c. 5.* for erecting *diversa cettagia* is ill; nay for stopping *quandam partem aquæ currentis*, is ill; 2 *Rolls Abr.* 80. in *Seavell's case*, *Cro. Jac.* 324. for stopping *quandam partem regie viæ*, ill, because not said how much, *Halsey's case*, 2 *Rolls Abr.* 81.

* SIR WILLIAM WILLIAMS, *e contra*. Here is sufficient certainty. It appears here that he hath taken above the old rates, *Sid. 91.* In the case of *Rex v. Lovel*, he took fifty shillings *colore officii* held good; these are immaterial circumstances. In *Dyer 99.* Prentment of an highway out of repair *pro defectu inhabitantium*, good, because number uncertain; so here, he took from all: it is *pro quolibet*, &c. for every score of sheep he took so much. The particular persons need not be named, for they are unknown to the attorney.

attorney. In *Johnson's case*, Cro. Jac. 609. He was indicted on 13 Rich. 2. st. 1. c. 8. for that the common price of oats was not above twenty pence *pro quolibet modio*, that he being *communis stabularius* sold *diversis subditis infra domum mansionalis* in Holborn two hundred bushel of oats for two shillings and eight pence the bushel, *contra formam statuti*, and held good, though not said what was the common price, though not said in his inn, &c. In *Sir Edward Lenthall's case*, Cro. Jac. 365. Information more uncertain, and held good; and in the case of *Bido v. Saunderson*, Cro. Jac. 440; and in *Penn's case*, Cro. Car. 314; and divers other cases, &c.

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HOLT Chief Justice. Every several taking is a several offence. How many several offences this man is convicted of, we cannot judge. Suppose, an indictment, that between such a day and such a day, he beat divers of the king's subjects; this is not one complicated offence, consisting of several facts, but several offences jumbled together: is he not to be fined proportionably to the number and value of what he took and frequency? They are distinct offences: a man may ingross *magnum quantitatem straminis et feni*, yet that has been held ill, (a) though but one offence. There ought to be a certainty; and I think judgment must be arrested.

DOLBIN Justice. Judgment ought to be arrested, we know not how to set a fine.

GREGORY Justice *ad idem*.

EYRES Justice. It is too universal. Judgment must be arrested. (b)

See the case of *Martin Van Henbeck*, 2 Leon. 38; for per EYRES Justice that is stronger.

(a) Cro. Car. 381.

(b) The judgment was stayed, S. C. 4 Mod. 103.

Smith against Cudworth.

Case 246.

COVENANT on an indenture, that in consideration of two thousand two hundred and fifty pounds to be paid to the plaintiff, as afterwards mentioned, the plaintiff covenants to transfer to the defendant, his executors, or such as he should appoint, on the 17th of February following, thirty shares in the stock of the linen corporation; and the said Cudworth covenants, that he, his executors, administrators or assigns, shall accept the same in the usual manner, the said 17th day, and *eadem tempore solvent* the money afore said. The plaintiff avers, that upon that day he was ready, and offered

If A. covenant to transfer stock to B. and B. covenant to accept the same in the usual manner, and at the same time to pay the money for it, it is not necessary for A, in an action of covenant, to al-

ledge an actual transfer, but if he alledge that he gave B. notice that he was ready to perform his covenant, and offered to transfer the same, it is sufficient; for the covenants being *mutual*, B. is liable for not performing his part *cy pro* by demanding a transfer, and being ready to accept the stock, although A. did not perform his covenant by transferring it. S. C. Holt. 547. 2 Saund. 155. 1 Ld. Ray. 124. 4 Bait. Abr. 16, 17. Dougl. 665. 1 Espinass. Dig. 335. 1 Term Rep. 645.

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to transfer according to the usual form, and thereof gave the defendant notice; that the defendant did not then accept nor appoint any person to accept the same, nor then, or at any time afterwards, pay, or cause to be paid, the * two thousand two hundred and fifty pounds, but the said stock to accept did then and there refuse. *Et sic infregit, &c.*—The defendant pleads; that the usual manner of transferring is by writing, entered in a book for that purpose, kept under the hand of the person transferring, and the usual manner of accepting it by writing entered in the same book after such transfer, declaring an acceptance; that the plaintiff did not transfer according to that or any other form, by reason whereof the defendant could not accept. *Et hoc paratus est verificare.* The plaintiff demurs.

MR. NORTHEY. This is no plea, for they are mutual covenants, and each has his remedy over. The defendant ought to have tendered his money, and demanded a transfer; (a) and the case of *Carter v. Taylor* here, the last term, was the same in effect with this: the like covenant with this about *East-India* stock; and the defendant pleaded, that no transfer could be, but to a merchant and freeman of that company, and that he was neither; and that the plaintiff had not transferred according to the indenture aforesaid, and the usage of the company; and judgment for the plaintiff, though the declaration was as here, only with a *paratus fuit et obtulit* transferred, &c.

See Jones v.
Buckley, Dougl.
659.
1 Lev. 293.

I ARGUED *e contra*, that the breach here is a non-acceptance, and not a non-payment, according as it was in *Carter's case*: then, though they are mutual covenants, yet one being dependant on the other, in the nature of the thing, and the first act being to be done by the plaintiff, their declaration is ill, because they have not averred a performance of their part: if it appear upon the whole contexture of the deed, or upon the record before you, that the intention of the parties was for us to have a transfer first, or that it must be so according to the natural necessary course of things, then they have no cause of action: now, by their demurrer, they have confessed the usual form for transferring, to be as we have alledged. Besides, in that declaration, they alledge not any transfer at all. Now, the nature of the thing bespeaks the necessity of a transfer first; we are to accept the thirty shares transferred; it can be no other: if they are to do the first act, then we have not broke our covenant; if the plaintiff's default disabled us from doing our part, that is a good cause. In the first place he is bound to transfer by his covenant without any demand from us, because he has undertaken by such his covenant to do so: *Fretivil v. Molinex, Cro. Jac. 145, 146. Chapman's case, Cro. Car. 76.* Then no demand being necessary to enforce a transfer, he ought to have transferred and averred it done, before he could charge us with a non-acceptance. The case * of *Carter v. Taylor* was different, for there the breach was non-

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(a) 2 Mod. 329. 5 Co. 10. Cro. Jac. 615. Comb. 265. 1 Saund. 319.

payment of the money, and the money might have been paid, though no transfer had been made, and then an action given for not transferring; but here the gift of his breach is non-acceptance, and that could not be but upon a transfer. Suppose he came to *York* to us, and said he would transfer, and we told him we would not accept, this could not be a refusal to accept, because there is nothing to be accepted but the thing which is to be transferred, and consequently it cannot be accepted till transferred. Suppose tenant for life covenants with a reversioner to surrender his estate to him by deed or generally, and the reversioner covenants to accept; in an action of covenant against the reversioner, would it be enough to say that he offered and was ready to surrender? I do agree that the words "*in consideration thereof*" will not make a condition precedent, 2 *Saund.* 156. in case the first be a negative covenant, because the one requires a continued performance, and the other attaches presently; but where both are capable of observance immediately or at the same time, as *Brocas's case*, 3 *Leon.* 219. Lord of a manor covenants to assure, the copyholder in consideration of that covenant performed promises to pay; no action lies for non-payment till assurance made: now though in that case it be said "*in consideration content' performat.*" yet here it quiches, for the nature of the thing implies it: it is generally true, where there are mutual remedies, there is no need of averring performance on the plaintiff's part; otherwise where the facts to be done are dependant each on the other, as here.

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See Blackwell
v. Nash, 1 Stra.
535.
Thorpe v.
Thorpe, 1 Salk.
171. and King-
ston v. Preston,
Dougl. 665.

But PER CURIAM our plea was deemed idle, and the declaration good.

Judgment for the plaintiff; and for the plaintiff, see the case of *Bragg v. Nightingale*, *Stiles* 140. (b)

(b) See the case of *Blackwell v. Nash*, 1 Stra. 535. and *Clark v. Tyson*, 1 Stra. 504. in point; and see *Boon v. Eyre*, H. Bl. Rep. 273. nota.

The King against Lord Dover.

Case 247.

HENRY LORD DOVER was outlawed on an indictment for treason; and he brings a writ of error.

Outlawry of a peer, omitting the addition of his barony, is erroneous.

The assignment of error was, *et super hoc HENRICUS BARO DE DOVER, qui per nomen HENRICI DN' DOVER utlaget' existit in propria persona sua venit et dicit quod in record' et process' præd. ac etiam in promulgatione utlagariæ præd. manifesto est erratum, in hoc quod dom. JACOBUS SECUNDUS nuper Rex Angliæ per literas suas patentes sub magno sigillo suo Angliæ gerent' dat' apud Westm. 13 die Maii anno regni sui primo quæ idem HENRICUS hic in cur' profer creavit eundem HENRICUM BARON' * de DOVER per nomen HENR'*

S. C. Comb. 189.
2 Inst. 665.
2 Roll Abr.
469.
1 Sid. 40.
Lit. Rep. 81.
Cro. Car. 104.
Carth. 14.
1 Stra. 316.
2 Stra. 850.
P. C. 109. 272.

Ld. Ray. 303. 509. 2 Hawk.

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BARON' DE DOVER *in com' KANTIÆ, unde ex quo præd. HENRICUS BARON' DE DOVER præd. in record' process' et promulgatione utlagat' præd. non nominatur BARON' DE DOVER, nec habet in eisdem aliq' sufficient' addition' sive titulum ideo in eo manifeste est erratum.*

In a record of outlawry it must appear that judgment was given by THE CORONER, ex-

cept it be in London, where it is given by THE RECORDER. — 2 Inst. 49. 3 Inst. 31. Co. Lit. 288. Dyer 317. 4 Term Rep. 521. 8 Co. 126. Cro. Eliz. 648. 2 Hawk. 634.

In a record of outlawry in London, it is sufficient if it appear that a capias issued to the county where the party is named.

3 Hen. 6. c. 10.

Staundf. 67. Hale's Sum. 209. Rastal 304. 2 Hawk. P. C. 433. 2 Hale P. C. 195. 3 Term Rep. 502.

General errors.

ERRATUM EST ETIAM *in hoc, viz. quod per record' et process' præd. apparet eundem HENR' utlagat' esse ubi per legem terræ nullum iudicium utlagat' versus eundem HENRICUM superinde promulgari seu aliquis processus versus præd. HENR' super indictament' præd. fieri emanari seu adjudicari debuisset ideo in eo manifeste est erratum et hoc paratus est verificare unde petit jud', &c.*

NOTE that the said judgment was reversed, for THE FIRST ERROR assigned, viz. want of a true addition according to the statute 1 Hen. 5. c. 5. As to THE SECOND, that is none, because in London, and the practice there is always different. As to THE THIRD *quer'* the statutes 6 Hen. 6. c. 1. and 8 Hen. 6. c. 10.

Case 248.

Radford against Taylor.

Trinity Term, 3 Will. 3. Roll 352.

A plaint in ejectment in an inferior court is good without stating for what house or land.

Ante, 338.

2 Term Rep. 11.

ERROR to reverse a judgment in ejectment *in cur' regis coram ballivis et civibus civitat' Lincoln'*. General error assigned.

I ARGUED that it was erroneous. The plaint was *de placito transgressionis et ejectione firmæ ad damn' querentis viginti librat'*; That it was too uncertain; that the plaint in those courts, is in nature of an original here above; and that it should have mentioned what house or land; here it is not said *firmæ suæ. — Sed non allocatur.*

Then I URGED that the judgment was erroneous, because it was *quod recuperet termin' suum præd. &c. et damp' suum præd. &c. nec non quinque libras eidem querenti ad requisition' suam pro misis et custagiis suis præd. per eandem cur' hic de incremento adjudicat', &c.* and doth not say *circa festam suam præd.* as are all the precedents here; and inferior courts are more precisely bound to observe the true ancient and legal forms, especially in judgments; and for any thing appears, it might be costs in another suit; and I cited the case of *Crible v. Orchard*, Styles 164. Error on judgment in debt in *Barnstaple Court*, and several exceptions moved and over-ruled; and ROLLS upon reading the record at last found this, and it was allowed PER CURIAM, and the judgment accordingly reversed. But PER CURIAM non allocatur.

RADFORD

TAYLOR

Judgment in an inferior court in ejectment "to recover his term and so much damages and costs, &c. is good without adding *circa festam suam*."

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Then I URGED another exception, that the *placita* was of a court held before such and such, *secundum consuetud' civitat' præd. a tempore cujus contrarii memoria hominum non existit usitat' et approbat' in eadem ac juxta libertat' et privileg' dictæ civitat' per diversas chartas regias inde concess' et confirmat'*; that it was inconsistent and contradictory that they should hold one and the same court by custom time out of mind, and by charter both; if it had been *confirmat'* only, it were well enough. Per HOLT Chief Justice. That has been an exception. But EYRES Justice seemed to incline it was well enough.

Q. If it is repugnant in stating the authority of an inferior court to say that it is held both by charter and prescription.

Post, 395. case 250. Styles 131.

But this was not much considered, because the writ was quashed, the writ being *coram ballivis et civibus*, and the record *coram ballivis seneschallo et communi clerico civitat'*.

Variance between the writ and the record.

Cowp. 120.

1 Term Rep. 240.

Tallent against Jermyn.

Case 249.

HUMFRIDUS TALLENT *gen' queritur de JOHANNES JERMYN in casu sur assumpsit, et præd. JOHAN. per E. H. att' suum venit et defendit vim et injur' et petit jud' de billa præd. quia dicit quod ipse nominatur et vocatur per nomen JOHANNIS GERMY et per idem nomen a tempore nativitatis suæ semper cognit' et vocat' fuit ABSQUE HOC quod ipse vocatur per nomen JOHANNIS JERMYN seu per idem nomen cognit' et vocat' fuit et hoc paratus est verificare unde petit judicium de billa præd. et quod billa illa cassetur.* The plaintiff demurs.

"Jermyn" and "Germyn" are different names; but if a defendant in pleading such misnomer say "and the" "afore said J." "comes and defends, &c." instead of "the" "afore said J." "who is impleaded by" "the name of" "G. comes and defends, &c." he thereby admits the name to be right.

And PER CURIAM, they are different names. But the plea is ill, because he does not say *quod JOHANNES JERMYN versus quem billa præd. &c. venit et dicit*, but says *et præd. JOHANNES, &c.* which PER CURIAM is ill, though the printed precedents in *Thompson* are as above: and judgment was given for the plaintiff, *quod respondeat ulterius*.

S. C. Comb. 188. S. C. Carth. 207. S. C. Lilly Ent. 509. 1 Keb. 105. 2 Keb. 437. Cro. Eliz. 85. 198. 257. Brook "Misnomer" 44. 48. 58. 2 Roll. Rep. 225. 3 Bac. Abr. 624. 1 Hale P. C. 175. B. R. H. 286. Raft. Ent. 29. Hens Pl. 9. 3 Bac. Abr. 624.

Saunders

Case 250.

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An inferior court may be stated to be held both by *custom* and *charter*.

Saunders *against* Vigor.

ERROR on judgment in *Bristol court*, and I **URGED** the exception of their courts being held by *custom* and *charter*, both; according to *Stiles* 131. *Sed non allocatur*: and judgment affirmed.

Case 251.

Crabb *against* Bowdler.

A declaration in an inferior court for goods sold and delivered must state that they were held within the jurisdiction.

ERROR on judgment in *Bristol Court*. An *indebitatus* for wares sold, says, that at *Bristol* he was indebted, and at *Bristol* he promised, but it is not said *ibid' vendit'*. And held ill, and judgment reversed.

6 Mod. 223. Salk. 404. 1 Saund. 73. 2 Will. 16. 2 Ld. Ray. 1310. 2 Stra. 227. Cowp. 18. and see the case of *Trevor v. Wall*, 1 Term Rep. 151. accord.

Case 252.

The King *against* Carrocke.

If an overseer deliver an account to two justices pursuant to 43 Eliz. c. 2. s. 2. & 4. they cannot commit him because such account is not sufficiently particular or to their satisfaction.

Carth. 152.
5 Mod. 179.
6 Mod. 77. 97.
Foley 20.
See 1 Vol.
Bell's Poor
Laws by Mr.
Const, page 258.

THE defendant was committed by the mayor and an alderman, two justices of peace of *Taunton*, by warrant, reciting that he and three others had been overseers of the poor of the parish of — within the borough, and duly summoned to appear that day to shew cause why they had not rendered an account of monies received and paid by them to the use of the poor; that the defendant had appeared before them two justices of the peace, and being demanded to give a just and true account of all such monies as had been received and paid, he had only produced an account *in gross* of his receipts and payments, and refused to give a particular account, or to produce his books, by which he received the monies on rates assessed, &c. and also a particular account to whom he paid such money charged in gross: and therefore they believed such account to be no account according to 43 *Eliz.* c. 2. s. 4. (a) and the said defendant hath refused to give any other account, they therefore commit him to be detained until he should make a true account before them, or two other justices of the peace for that borough.

And upon an *habeas corpus* he was here discharged **PER TOTAM CURIAM**, because the justices had no authority to commit in this manner by the statute of 43 *Eliz.* c. 2. for that an account was confessed to have been rendered, &c.

(a) See the 17 Geo. 2. c. 38.

* Delbye *against* Proudfoot and others.

Case 253.

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PROHIBITION. The defendants had subscribed a *policy of assurance* to the plaintiff, and a loss happening, the defendants were sued at law, and declaration delivered. Thereupon the defendants summoned the plaintiff before the commissioners for determining of policies, the same being made in the office, pretending that the said policy was had and procured by *fraud*, and endeavoured to have the policy delivered up by order of the commissioners there, according to 43 *Eliz.* c. 12; the 14 *Car.* 2. c. 23; and 19 *Car.* 2. c.

The court of commissioners of policies of insurance only extends to suits by the *insured* against the *underwriters*; and therefore if on a suit commenced at law against *underwriters* they summon the assured to appear before this court, on pretence that the policy was obtained by *fraud*, A PROHIBITION shall go.

Stiles 166.

2 Sid. 121.

4 Bac. Abr. 251.

3 Bl. Com. 75.

Lex Mercatoria 292.

The Introduction to Mr. Park's Law of Insurance, xlii.

Thereon I MOVED for a *prohibition* on a suggestion of this matter, for these reasons, that they have no jurisdiction in this case; that *fraud* and *no interest* annuls the policy at common law; (a) that it is good evidence upon the general issue; that we had our action on the policy here, and so a jurisdiction was attached; that this method would deprive us of our evidence at law, *viz.* the written policy; that this would erect another court of equity in consequence to controul suits at law: besides, that they had no authority in this matter by the acts of parliament; that that summary method therein prescribed without trial by jury, was never intended further than the relief of the *insured* against the *insurers*, and being such a law, was not to be extended further than the words; that the mischief recited was trouble for the insured to sue every several insurer distinctly; that though the purview be general, to hear and determine causes arising upon policies of assurance, yet several other clauses shew the intent, as that upon appeals the party grieved shall first satisfy the decree, or at least deposit the monies decreed in the commissioner's hands, which plainly means the assurers to be appellants, and upon suit so brought before them by the assurers upon appeal, the chancellor is to award double costs; that any other construction would make a clashing of jurisdictions.

And we had a rule for a *prohibition* unless cause, and to stay in the mean time.

But they never moved it again; and so my client was quit of them there.

(a) See 2 Bl. Com. 460. 1 Black. Rep. 594. 3 Burr. 1909. Dougl. 327. and Park on Insurance. 174.

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* Trinity Term,

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The Fourth of William and Mary,

IN

THE KING'S BENCH.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt.

Sir WILLIAM GREGORY, Knt.

Sir GILES EYRES, Knt.

} *Justices.*

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King *against* James.

Cafe 254.

INFORMATION for perjury in an affidavit in the Common Pleas, made before the commissioners in the country, in a certain cause depending there. The defendant was tried before EYRES *Justice*, and convicted, and several exceptions arising upon the evidence, he stopped the *poslea* till the opinion of the Court was had upon motion.

In perjury: the *capias*, *warrant*, and *affidavit*, are good evidence that a cause was depending.

Cowp. 66.
Dougl. 41.

FIRST, The proof of a cause depending was only a *capias* and *warrant* thereon, and *affidavit* filed and allowed.

SECONDLY, I urged another exception, that there was no proof that the party (before whom the affidavit was sworn) was a commissioner, and held that it need not, unless you disprove it on the other side.

In perjury, on an affidavit before a commissioner, his authority need not be proved.

S. C. Carth. 220. S. C. Holt 284. Dougl. 156.

1 Term Rep. 69.

THIRDLY, That the proof was only by copy of an affidavit, and no proof that it was the defendant's.

Copy of an affidavit on which perjury is assigned, is good evidence.

dence on proof of its having been examined with the original on the file; without producing the persons who took it to prove the *jurat* or the *identity* of the prisoners.—2 Burr. 1189. Cases in Crown Law 48.

I URGED,

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I URGED, that this is a dangerous practice; any man might be represented; a false oath may be sworn by another man in my name.

And PER CURIAM the affidavit being of the defendant in the cause, and used by him, upon motion in court it is enough; otherwise if not so: but a copy of an affidavit only produced against a man without proof that he made it, used it, or was concerned in the cause, that would be insufficient.

JUDGMENT for the king.

Cafe 255.

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If a statute create a new offence and prescribe a particular method of punishment, the method so prescribed, and not the common law method by indictment must be pursued.

- S. C. 4 Mod. 244.
- S. C. Carth. 263.
- 7 Co. 36.
- 2 Roll Abr. 84. 247. 398.
- 7 Mod. 34.
- 1 Saund. 249.
- 6 Mod. 86.
- 2 Hawk. P. C. 302.
- 1 Ld. Ray. 347.
- 3 Com. Dig. 501.
- 4 Com. Dig. 71.
- Fitzg. 47.
- 3 Bac. Abr. 97. 101.
- 4 Bac. Abr. 654.
- 1 Burr. Rep. 544.
- 2 Burr. Rep. 759. 834.
- Comp. 524. 650.
- 3 Term Rep. 442.

The King against Marriott.

INDICTMENT that he kept a common ale-house without license *contra formam statuti*. On Not guilty pleaded, there was a verdict for the king.

I MOVED in arrest of judgment that no indictment lies; because it is a new offence created by a particular statute, and a particular method appointed for the conviction and punishing of it: at common law any man might keep an ale-house, and might sell beer or ale, out of, or in his house at pleasure, and there was no law to restrain them; though as to inns, some opinions have been, that licences were necessary, as CROKE *Justice* and some others held, 1 *Bulstr.* 109. Contrary is *Godb.* 345. and 2 *Rolls Abr.* 84, that no indictment lies at common law for erecting an inn without a license; it is true, they may be punished as nuisances, if in inconvenient places. In the resolution concerning inns in 19 *June*, 22 *Jac.* 1. it is resolved that any might erect an inn without any allowance or license, and any man might keep an ale-house before the statute of 5 and 6 *Edu.* 6. c. 25. as at this day any man may set up hackney coaches for hire, or use any trade not prohibited by 5 *Eliz.* c. 4. Now where a particular method is prescribed, that is to be pursued, and no other. By the 5 and 6 *Edu.* 6. c. 25. the justices have power to remove and put away the common selling of ale and beer in any such places as they shall think fit, and none shall be admitted or suffered to sell, but such as shall be licensed, &c. giving recognizance. By sect. 4. if any person shall do it of his own authority, two justices shall commit for three days, and before deliverance the said justices shall take recognizance not to sell again: then he is to make a certificate to the sessions, which shall be a sufficient conviction, and there they are to assess forty shillings fine. Now it is plain, this method can never be observed upon an indictment, and the makers of this law never intended such a prosecution; here are no negative words, but only by way of prohibition to the justices not to suffer any without license: the first gives them authority to remove and put away from such places as they shall think fit; then it is said none shall be suffered, which is a prohibition on the justices, not upon the party: then the third statute shews it plain, for there where order is taken about inquiry into

into the breach of the recognizance for keeping an orderly house, it is said "by presentment or otherwise," now here in this clause is no such thing. Then * for 3 Car. 1. c. 3. there it is to be on view by the mayor, justice, or head officer, on oath of two witnesses before him, and the penalty to be levied by the constable upon warrant, and the words are only, "if any person or persons, &c." and no negative words at all. In *Palmer's Rep.* 388. by HAUGHTEN Justice, a man cannot be indicted for keeping an ale-house without license, for the statute 5 and 6 Edw. 6. c. 25. is that they shall be committed, and the justice shall therefore imprison the party; and 2 *Rolls Rep.* 398. is the same. *Castle's case* on 18 Hen. 6. c. 11. in *Cro. Jac.* 643. and 2 *Rolls Rep.* 247. is express; it was an indictment for taking on him to be a justice of peace, not having lands to such a value, and the same exception taken as here, because the statute appoints a penalty, which is to be recovered by bill, plaint, or information, and therefore not by indictment, because no offence before; and the court was all of opinion, that where a statute inflicts a penalty for the doing of a thing that was no offence before, and appoints how it shall be recovered, it shall be punished by that, and no other means; not by indictment; and that statute is precisely as this, that none shall be assigned, &c. It is one of the resolutions upon the case of penal statutes, 7 Co. 36. That every act which gives a new penalty, ought to be pursued strictly, both in the prosecution and levying of it, according to the method prescribed by the act: and in *Plowd.* 206. *Stradling's case*, it is allowed as a rule, when an act of parliament gives power or interest to a particular person, that particular designation is exclusive of any other; the like case was here, in Easter Term, 2 Jac. 2. *Rex v. Joyce*, an indictment for keeping an ale-house without license, and SIR HENRY POLLEXFEN moved then as I do now, to arrest the judgment for these and the like reasons, and the judgment was arrested: besides, this is to inflict a greater penalty; for the charge of trying an indictment is more than the penalty; perhaps it may be more just and fair for trial, but the other is less expensive; and that may be the reason why this law doth not mention indictment. OBJECTION. *Crafton's case*, 1 Mod. 34. Sid. 439. against a nonconformist for residing in a corporation; but that was *Zachary Crafton's case*; for there it was to be by bill, &c. (a) Here are clauses that particularly seem to restrain it to this method, viz. Committed till he give recognizance, which the justice is to certify; which this court cannot execute. In *Rex v. Baker*, Hilary Term, 24 Car. 2. in 3 *Keble.* 106. for wages gone; that seems to the contrary; but *Castle's case* is as strong an authority for me; and I know of no judgment * ever had in this case, but that of *Joyce*. This hath been rarely practised, which shews the current opinion to have been against it. *Rex v. Fawcner*, 2 *Keble.* 501. was one, and SAUNDERS took exception, because not said *cont' form' statut'* and quashed; but this question could not happen there, because upon the statute.

HOLT Chief Justice *ceteris consentientibus*, let it stay.

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(a) This case is denied to be law, see 1 Mod. 34.

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EYRES *Justice*. It cannot be maintained I doubt. (b)

(b) HOLT Chief *Justice* was of opinion that the indictment would lie; but DOUBIN and EYRES *Justices* were of a different opinion, S. C. 4 Mod. 145; and therefore the indictment was quashed. S. C. Carth. 263. This point however seems to be settled, for *Crofton's case* has been denied many times, Fitzg. 47. 1 Burr. 543. and in the case of *Rex v. Penfax* it was determined, that where a statute creates a new offence and appoints certain particular remedies, of which an indictment is not one, the particular remedies appointed by the statute can alone be pursued, 1 Bar. K. B. 127. S. C. 2 Sess. Cases, 172. *Rex v. Wright*, 1 Burr. 544. and on this principle it was determined in the case of *Stephens v. Watfon*, that an indictment will not lie on the statutes of 1 Jac. 1. c. 9. and 3 Car. 1. c. 3. for keeping an ale-house without license, for it was no offence at common law, 1 Salk. 45. for wherever a new offence is created by statute, and a special jurisdiction out of the courts of the common law is prescribed it must be followed, *Hartley v. Hooker*, Cowp. 524. 2 Hawk. P. C. 302. But where new created offences are only prohibited by the ge-

neral prohibitory clause in an act of parliament, or where there is a substantive prohibitory clause, and also a particular provision and a particular remedy given, there an indictment will lie, *Rex v. Wright*, 1 Burr. 544, 545. *Rex v. Robinson*, 2 Burr. 803. So also where the offence was punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, then either the method of indictment by the common law, or the method prescribed by the statute may be pursued; for in this case the sanction is *cautionem*, and does not exclude the common law punishment, *Rex v. Robinson*, 2 Burr. 803. Therefore where a statute directs an act to be done without pointing out any mode of punishment, the common law method by indictment for disobeying the directions of the legislature, Dougl. 441. 446. is not taken away by a subsequent statute pointing out a particular punishment for such disobedience, *Rex v. Davis*, Sayer's Rep. 133. 1 Bott's Poor Laws, Mr. Conit's edit. 300. *Rex v. Boyal*, 2 Burr. 832. *Rex v. Balme*, Cowp. 650. See the case of *Cater qui tam Knight*, 3 Term Rep. 442.

Case 256.

Butcher against Porter.

Hilary Term, 3 Will. & Mary, Roll 282.

REPLEVIN in an inferior court, if judgment be given that the plaintiff "nil capiat" "per narrationem suam" instead of "querelam suam," or that the plaintiff "sit in misericordia" omitting "et plegii sui, &c." it is erroneous; but the court above will give such judgment on the record as ought to have been given by the court below. S. C. Carth. 243. Salk. 401. 4 Bac. Abr. 377. 4 Term Rep. 509.

ERROR upon judgment in the court at *Windſor* in *replevin*. Butcher on the ninth day of June in the second year of William and Mary, levies a plaint there against Thomas Porter in *placito captionis et injuste detentionis bonor' et catallor' suorum et invenit pleg' et petit process' in placito præd.* And there is a precept to replevy and deliver the goods to the plaintiff, and a return of a *deliberar'*, and a summons of the defendant: and he appears: and the plaintiff counts for the taking and unjust detaining of the several goods in the plaint: and the defendant pleads *quod præd. quer' action' suam præd. inde versus eum habere seu manutenere non debet quia dicit quod tempore captionis bonor' et catallor' præd. fieri supposit' proprietates bonorum et catallorum præd. fuit cuidam ROGERO SAUBEC adhuc superstiti et non presat' JOANNI BUTCHER; et hoc paratus est verificare, unde petit jud' et return' bonor' et catallor' præd. sibi adjudicari, &c.* The plaintiff demurs. The defendant joins in demurrer, *et ut prius petit judicium, et quod præd. JOHANNI BUTCHER ab actione sua præd. inde versus ipsum THOMAM haben' precludatur.* The Court gives judgment *quia videtur placit' præd. fore sufficient' ideo considerat' est per eandem cur' quod præd. JOHANNES BUTCHER nil capiat per nar' suam præd. sed quod ipse sit in misericordia pro falso clamore suo inde, et præd. THOMAS eat inde sine die, et quod habeat return' bonor' et catallor' præd. detinend' sibi irreplegiabilia inperpetum, &c.* General

General error assigned by the plaintiff *Butcher*, who brings the writ, &c.

BUTCHER
v.
PORTER.

I ARGUED for the plaintiff that this judgment ought to be reversed.

FIRST, Because it is not said *et pleg' in manu mea*, as it ought to be, and so are the precedents, *Hern's Pleader*, tit. "Second Deliverance," 650, and *Coke's Ent.* 591. (a)

SECONDLY, It is "*nil capiat per nar'*," it should be "*querelam*," for the *plaint* is that which makes his demand in court; and inferior courts are bound strictly to observe and pursue legal forms.

BUT PER CURIAM that is true, and the judgment must be reversed; but we must give a good judgment * as they ought to have given, according to *Slocomb's case*, *Cro. Car.* 442.

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But then I ARGUED that here could be no return awarded, because there was no avowry made for it; and so are the precedents in *Rastal's Ent.* 568. where he pleads a property in another. And for the case of *Salkeld v. Skelton*, *Cro. Jac.* 519. it referred to a case moved before, and there is no such to be found in the book. In *Bro. "Replevin."* 1. Replevin against two of a taking in P. in the vill of B; the one says P. is in C. and not in B. and for a return avows as for *damage feasant* in his several soil; the other pleads property in another; per BROOK, he ought to crave judgment of the writ. In *Plac.* 31. it is 39 *Hen. 6.* 35, plea of property in another, and an avowry to get a return, which avowry *n'est bon*, and there held he shall have no return, for that always where the defendant pleads in abatement, he must make an avowry for to have a return; by which it seems not pleadable in bar:—But PER CURIAM it is pleadable in bar and needs no avowry: (b) for per PRISOT, in that case I cited, he shall have a return without avowry, because the plaintiff had a deliverance without cause: and for *Salkeld's case*, *Cro. Jac.* 519. though the case was not put there, yet it is 2 *Rolls Rep.* 64. and both together make a good report. Then adjudged that though no avowry, yet notwithstanding he should have judgment for a return; for it appears by the plaintiff's declaration that the defendant took them, and so he had possession; and that by the replevin sued, they were delivered to the plaintiff, wherefore when the writ is abated, it is reason that a return be adjudged, that the defendant may be in *statu quo prius*. In case of non-suit, before declaration, the defendant shall have a return, for that there he is prevented of his avowry, and here it is no reason the plaintiff should have the goods from the defendant's possession, when he has no property: and by that book return shall be awarded in every case, where it appears that the defendant was in possession of the beasts, if delivered by replevin.

In replevin, if the defendant appear and plead property in a stranger in bar he may have a return without avowry.

S. C. 1 *Salk.* 94.
2 *Roll Rep.* 64.
1 *Vent.* 127.
Carth. 139. 244.
Cro. Jac. 519.
2 *Lev.* 92.
2 *Roll Rep.* 64.
Mod. Caf. 103.
2 *Lev.* 92.
1 *Salk.* 94.
6 *Mod.* 81.
1 *Ld. Ray.* 217.
2 *Ld. Ray.* 984.
985.
5 *Com. Dig.*
Pleader (3. K.
13.)
4 *Rac. Abr.*
395.
S. C. cited 2
Ld. Ray. 1017.
3 *Term Rep.*
349.

(a) The precedents as to this point are both ways, *Rastal Ent.* 557. 562. 570. *Co. Ent.* 589. 591. 595. and therefore *quere* if this judgment is not right, for the pledges are only sureties to the king for the

plaintiff's amercement, and ought not to be amerced themselves, 4 *Inst.* 180. 596. *Plowd.* 274. S. C. *Carth.* 243. *notia*.

(b)

BUTCHER
v.
PORTER.

In replevin
judgment may
be given for
a return, al-
though the
plaint is before
the caption.

* [402]

But then I URGED that here no judgment could be given for a return because here was no replevin sued of any taking, nor could the plaintiff have a delivery, for the plaint was nine days before the day of caption supposed, and then the precept for delivery was illegal, which was as none, for it is *mandatum est ex parte domini regi.*, &c. and then the plaint was of things where no replevin lay, and a variance between the plaint and count, and therefore there ought to be no return; for if the count abate for false Latin, or other defect of the clerk, and not of the party, no return, 2 *Rolls Abr.* 433. 3 *Hen. 6.* 3. But, PER CURIAM, your own fault, in bringing a plaint before you had cause for it, or adding particulars * which could not lie, shall not prejudice him that had the possession.

And at last THE COURT gave rule for the reversal of the judgment, and that a new judgment should be entered, *quod nil capiat per querel.*, &c. and no return awarded. (c)

(c) *Vide* 35 *Hen. 6.* 40. pl. 1. And the case of *Wildman v. North*, *Trin.* 25 *Car.* 2. *Ret.* 357. mentioned in 3 *Keb.* 219. 232. That property in another may be pleaded in bar or abatement, for that he cannot plead *non cepit*, for he took the cattle though not *sua*. But in all other cases he must *avow*, and make title for to have a return.

No bond but pledges in replevin, 1 *Browl.* 173. though the course is to take bond. No inquiry of damages can be without *avowry*, 3 *Kib.* 837. and not on 17 *Car.* 2. c. in inferior court. 2 *Keb.* 550. *Vide* 2. *Inst.* 340. where a second deliverance lies. No 111 to the former edition.

Cafe 257.

Howard against Pitt, and others.

If judgment be given against five; and pending a writ of error, one dies; and the year expires, a *capias* may be taken against survivors without *scire facias* or *remittitur*.

S. C. 1 *Salk.* 261.
6. C. *Holt.* 1.
S. C. *Carth.* 236.
Ante, 186.
2 *Bull.* 235.
3 *Co.* 14.
5 *Co.* 88.
Yelv. 209.
Ray. 153.
4 *Mod.* 315.
6 *Salk.* 319.
3 *Com. Dig.*
294. 341.
1 *Ld. Ray.* 71.
244.
2 *Ld. Ray.* 1391.
2 *Bac. Abr.*
359 362.
Dougl. 637.

TRESPASS. And, in Michaelmas 1688, verdict, and judgment against Sir John Lawrence, Sir William Pritchard, Sir B. Newland, Sir Edward Aney, George Pitt, Esq; and James Smitheby, for fifteen hundred and fifteen pounds damages and costs. The defendants brought a writ of error, and the record is certified into THE EXCHEQUER CHAMBER. Smitheby died; and the surviving defendants, fearing the writ of error was abated by his death, brought another writ in the names of the five survivors, and the writ allowed, and bail put in, and no nonprocess, nor affirmation of the judgment, nor any *remittitur* of the record upon the writ on which it was certified: but Sir John Lawrence being dead, the plaintiff brings an action, and arrests Mr. Pitt, on a bill of Middlesex, with an *ac etiam* bill for fifteen hundred and fifteen pounds debt, and after five hours imprisonment charges him with an execution, sued out only against four of the defendants; but never removed the judgment by *scire facias*.

Hereupon it was moved for Mr. Pitt to discharge this execution as irregular and erroneous, for these three reasons:

FIRST, That there ought to have been a *scire facias* in regard the judgment was three years old, and not affirmed on the writ of error.

SECONDLY,

SECONDLY, That no execution ought to have issued until the second was remitted back out of the Exchequer Chamber.

HOWARD.
PITT.

THIRDLY, That the judgment being against six persons, and some dying, execution ought not to have gone against the rest, without a *scire facias*.

* As to THE FIRST, it is true, the bringing of a writ of error, prevents the need of a *scire facias*, but that is only on an affirmance of the judgment, because there is a new judgment, and so they may sue out execution within the year after that, without *scire facias*, but not where it is only abated or discontinued. But PER CURIAM the case of *Bellasis v. Hunford*, Cro. Jac. 364. is error discontinued, and no affirmance, and yet the party prayed in execution after the year, without *scire facias*; as it is in *Rolls Rep.* 104. 133. a distinction is made, where actually in *custodia marischalli*, and where not; but CROKE takes no notice of any such distinction, *Yelv.* 7. Cro. Eliz. 891.

* [403]

SECONDLY, there ought to be a *remittitur*. The act of parliament that erects the court says, the record shall be sent thither, and afterwards remitted, that so process and execution may be done thereupon; and the constant practice is to remit it, and to join a record of all the proceedings there to the plea-roll of this court, and there is reason for it; the record is certified; this court ought to be apprised of somewhat before they award execution. Their hands were once closed, what is there that warrants a liberty to sue execution? But they say for the plaintiff that there must be a *remittitur* upon an affirmance; and so when the plaintiff in the errors is non-suited, or the writ of error discontinued; but not when abated by death. We answer, that the abatement ought as well to appear by a *remittitur*, as any other proceedings; the resolution in *Palmer's Rep.* 186. is general, that the writ of error closes the hands of this court, so that they cannot award execution until it be discussed; and when it is determined there, they remit the transcript hither; it is *scire facias quare executio non* is to be brought there, and then the plaintiff to be non-suit, and then a *remittitur*, which shall be an authority to award execution here. This court cannot take notice of an abatement, or other end of that writ, but upon a *remittitur*; there is always a *remittitur* upon a reversal, for otherwise this court could not give a new judgment here as they ought to do. The cases of *Latch.* 59. *Jones* 66. of *Crouch v. Hayn*, are of error in parliament, abated by dissolution of parliament by demise of the king, which this court must take notice of; otherwise here: besides, the statute requires a *remittitur* generally, *Bellasis's case*, Cro. Jac. 364. is for us in this particular, for there it is said by MAN, execution without *scire facias* upon remand, so that by him a *remittitur* was necessary there.

THIRDLY, here is one deal; here is an alteration of the parties; the nature of the execution is changed; for they ought to pursue their judgment; every execution ought to follow the record, and

HOWARD
PITT.

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the writ must agree with it, otherwise it is illegal, and so are * all the books, *Vicars v. Okey*, 2 *Keb.* 307. *Sid.* 351. and 1 *Keb.* 92. 123. In 2 *Inst.* 471. no execution, if the parties be altered, without *scire facias* whether on the plaintiffs or defendants part, *N. B.* 267. *Isted's case*, *Cro. Eliz.* 367. If two recover, and one die, a *scire facias* is necessary, the same reason *e cont.* The case of *Noy*, 150. is denied for law in *Cart.* 112. 122. 193. Though there BRIDGEMAN inclines against us; the printed precedents are with us, *Theaurus Brevium*, 18. *Brownl. Judicial Writs*, 11. *Scire facias* sued in this case; here the judgment was joint, the execution ought to be so; they might have brought a *scire facias* and then we should have had liberty to answer: supposing the party surmised dead in their *capias*, be not dead, what then?

THOMPSON and SQUIBB *e contra* there needs no *remittitur* nor *scire facias*. Execution might have issued against them all, without taking notice of any man's death, and then the mentioning of the death of one, surely can be no harm to the rest. If one of the defendants die after judgment, no abatement of any judicial process; no need of *scire facias* but where the parties are altered, and so that they are not here: one plaintiff dies, the survivor may take out execution, *Moore* 367. *Noy* 150. In *elegit*, it must be against all, here each is liable. In case of verdict against four, and one dies, I may there alledge one dead, and pray judgment against the rest, and it is well, and there need no *scire facias*; besides, it is a discretionary thing in the court to supercede an execution; in this case they may bring their writ of error in *adjudicatione executionis*.

HOLT Chief Justice. Why should there not be a *remittitur* in case of an *abatement*, as well as in case of a *non-suit* or *discontinuance*, which are equally within the words of the statute, for neither of them are expressly there; there you might have had judgment on a *scire facias quare executio non*, but to have prosecution immediate without any notice to us of what is become of the writ of error, I do not understand: I think you cannot have an execution after the year without a *scire facias* or a *remittitur*: (a) here is a year expired, pray how do they happen to stop upon the death of one of the plaintiffs? if they take notice of it, they ought to remit it for that cause: and of that mind was ALL THE COURT. But for the execution against one, the other dying after judgment, if a *scire facias* be needful, the practice hath been different. Suppose two plaintiffs, and one dies, there must be a *scire facias* but here you know your remedy, you must bring a writ of error *tam in redditione judicii quam in adjudicatione executionis*. And a *superedeas* being a discretionary act, the court would * not relieve us upon motion, nor declare any opinion upon the last *quere*: and Mr. Pitt paid the money.

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Vide 4 *Leon.* 197. *Not law.* 1 *Rolls Abr.* 899. 15 *Hen.* 7. 16.

(a) *Salk.* 319. 1 *Will.* 302. 14. *Ray.* 768. *Dougl.* 614.

The

The King *against* Pett and the Inhabitants of Beingsfield Case 258.
in Suffolk.

BY the justices one *Crane* was put apprentice to one *Browning*; who dies and administration is committed to the defendant. The apprentice falls sick; and becomes chargeable to the parish. The justices make an order for sending him to the defendant; and to maintain and provide for him. The defendant appeals; and the sessions in *Suffolk* confirms the order. These orders are removed by *certiorari*.

The sessions cannot, under 5 Eliz. c. 4, order *executors* to maintain and provide for the apprentice of the testator; although such apprentice has become chargeable to the parish; but a covenant to maintain is not discharged by the master's death.
S. C. Carth. 231.
S. C. Salk. 66.
S. C. 3 Salk. 41.
S. C. Mod. 27.
12 Mod. 27.
Salk. 204.
March 3.

I MOVED to quash them, for that the justices had no authority to make an order on my client; their jurisdiction is only upon the person of the master, and not upon his executors or administrators; (a) that such a construction must bring a great deal of confusion in the law; for suppose no *assets*, shall the justices try that? Shall this expence and charge be pleadable to any and what suit by creditors? Suppose the administrator live in another parish or county, must the apprentice be sent after the administrator? Suppose that he proves poor himself, then that parish where he lives must be chargeable with this apprentice; which certainly the statute never intended: if there be covenants in the indenture that reach the executors, those may be saved, and then we have liberty to plead to it: (b) but now by this order we are settled, &c.

And PER CURIAM the order was quashed.

- (a) See 20 Geo. 2. c. 19. 216. Rex v. Peck, Salk. 66. Hambley v. Trotter, Cowp. 373. and 1 vol. Conf. edit. of Bott's Poor Laws, 529.
(b) See the case of Walker v. Hall, 1 Lev. 177. Wadsworth v. Grey, 1 Sid.



* Michaelmas Term,

* [406]

2 Bac. Abr.
415.

I N

The Year 1679.

The C A S E

Cafe 259.

O F

A PAROL ADMINISTRATION.

A. makes B. his *executor* and dies. The ordinary commits *administration* to C. the widow of A. by *parol* only, taking an oath of administration, and giving security; all which is entered in THE REGISTER. C. sells several goods to D. by virtue of this administration, and then B. refuses. C. dies. Administration is granted to E. by *letters*, who brings trespass against the defendant D. the vendee. If it will lie?

THE FIRST QUESTION is, If the first administration to C. the widow of A. be good?

SECONDLY, Admitting it void, if the sale be good against E? (a)

I AM OF COUNSEL with the defendant in the cause, who is a purchaser of goods upon valuable consideration, as the very term "sale" implies, and on that account we may expect more favour than otherwise; and truly if this action be allowed, the vendee will have a hard bargain of it, to pay twice for his goods, and to pay a fine to the king too, or else be liable to an outlawry; but yet we hope to have the plaintiff in *miser cordia pro falso clamore* for his vexatious suit, without the least colour or pretence, as will be plain and manifest, if we prove either of the two points.

Q^a. If an administrator, by *letters* of administration, can maintain trespass against the *vender* of an administrator who had administration granted by *parol* only, but entered in the register, before the *executor* named in the will of the deceased had refused to prove the will.

Plowd. 280.
1 Leon. 90.
Dyer 339.
6 Co. 19.
2 Lev. 183.

(a) See the case of *Abram v. Cunningham*, 1 Vent. 303. 2 Lev. 183. 2 Mod. 146. 2 Jones, 72. 1 Freem. 445.

Therefore,

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Therefore, as to THE FIRST POINT, whether the administration to C. be good. And I humbly conceive it is, and question not but you will conceive the same presently. Now it is well known, that if a man seized of lands and tenements, or possessed of goods and chattels in his own right doth die, the heir at common law is he that by right of blood shall succeed to the former, but with him we meddle not; as to his goods the law hath appointed two sorts of persons for the administration of them for payment of his debts, and distribution of the residue for the good of his soul; one of them is constituted by the party in his last will; the other may more properly be said to be appointed by the law in default of the former; (b) these two differ in this, that the former may appoint an executor to the first testator, so cannot the latter, and they agree in this, that an administrator is entitled to all the goods and chattels of the intestate, as much as an executor to those of the testators, both alike liable to payment of debts and legacies, and they are both accountable; about the latter only is our present business.

By 31 Edw. 3. c. 11. the ordinary must grant administration to the next and most lawful friends of the deceased.

2 Bulst. 4.
78id. 302.
2 Inst. 598.
9 Co. 41.
Salk. 37.
Doug. 544.

It may not be amiss therefore to consider how the administrator came by this power, and I take it to be chiefly given him by the 31 Edw. 3. c. 11. which gave him authority to sue for, and recover the intestate's debts; for before this, though the ordinary was liable to debt as far as the goods in his hands did reach by the statute of Westminster the second, yet he could not get any of the intestate's goods out of other men's hands, neither could he nor his committee, or whatsoever you will call him, recover any debt, though due by specialty, till this statute of 31 Edw. 3. c. 11. Therefore I account this the principal statute that gives him authority, &c.

But by 21 Hen. 8. c. 5. it shall be granted to his wife or next of kin.

But this is not much material since now he hath it; and our sole question is, if the administration in our case be well committed to C. the widow of A; and there can be no dispute, but that we are next of kin, and if to any body, it ought to be granted to her, by 21 Hen. 8. c. 5.

Administration granted, before the executor named in the will has refused, is void.——

Now all the pretence that can be to make it void, is either FIRST, because there was an executor, in being; or, SECONDLY, because it was granted by *parol* only, &c.

Moit 636. Plowd. 279. 282. 9 Co. 37. 1 Leon. 90. 135. 2 Jones 72. 1 Vent. 303. 2 Lev. 183. 2 Mod. 147. 149. 1 Salk. 36. 307. 311.]

For the first, I think it scarce worth mentioning, for I do take the law to be clear, that the ordinary may commit administration till the will be proved; and if it be never proved, the administration stands good and cannot be revoked; and in our case the executor meddles not with the goods, nor does he release any debt; he doth no way

(b) See 9 Co. 38. Finch's Law, 173. 2 Bl. Com. 494.

administer;

administer; without all question, by this authority from the bishop she hath an interest in her husband's goods against all but *B.* and albeit that *B.* need not be at the trouble to repeal the administration, but may avoid it by seizing the goods, or otherwise administering, or proving the will, yet till he doth one of them it is good: I might cite many authorities to prove all this, but shall only refer you to *Godolphin's Orphan's Legacy, &c.* (c)

But further, when the executor doth afterwards refuse, it is as if there never had been a will, and so none appointed by the party (d), and then the ordinary's power comes * fairly in play, and his power is well exerted, and his office duly performed in granting administration to the widow, who by law ought to have it: I conceive this may be granted to me.

After refusal by the executor named, administration may be granted to the widow of testator.

Ante 351.

Ray. 93. 1 Vern. 315. Salk. 36.

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As to the second rub of its being granted by *parol* only, &c. It is sufficient, and my opinion in this point is grounded both upon authority and reason. First upon authority, and that is the words of the author last-mentioned, *Godolphin*, in his *Legacy*, p. 231. where he saith, an administration must pass under seal in writing, not by word of mouth, for the ordinary cannot commit administration by word of mouth, otherwise is it if it be granted and entered in THE REGISTRY, though letters of administration be not drawn; these are his own words: now though he were neither a judge nor a professed common lawyer, yet his known skill in both laws, and his long experience in the ecclesiastical courts, may well attract so much credit to his words, as to judge him capable of knowing what was the allowed practice. But I depend not solely on him; for SECONDLY, The reason of the thing makes it good. Now what is the cause why regularly there should be letters? it is for certainty, and that it may not be done rashly, and also that the party may have them to shew in court. Now certainty enough, and deliberation sufficient there is in registering it, and to that the creditors and the other relations of the party deceased, may have recourse to know whether administration be granted, and to whom.

Administration must be granted in writing under seal, and not by *parol*.

Dyer 294.
Stra. 1137.

(c) There appears to have been some doubt, whether the ordinary could grant administration *pendente lite* of a will, 2 Bac. Abr. 415. In *Robin's case*, Moor 636. the Court seemed to think that he could not. In the case of *Frederick v. Hooke*, Carth. 153. a distinction is taken that when the *lis pendens* is in the spiritual court concerning the right of administration, there an administration granted during the controversy, is good, but where it is concerning the will, it is not. But in the case of *Walker v. Woollaston*, 2 Peer Wms. 576. it seems to be settled that an administration *pendente lite*, touching the will, is

good. S. C. 2. Stra. 917. See also the case of *Impey v. Pit*, 2 Show. 69. where it was resolved that an administrator *pendente lite* of a will, is liable to an action, for that he is fully an administrator for the time, S. C. 2 Jones 133.

(d) But until an executor does refuse to prove the will, he is in contemplation of law executor, for his right is derived from the will; the probate is only evidence of it; and thereupon he has a constructive possession from the testator's death. Smith assignee of *Clark v. Mills*, 1 Term Rep. 480.

And

An administrator unless he sue as administrator, need not shew the letters of administration.

Ante, 355.

And then as to the shewing them in court, I grant that the plaintiff ought if he sue as administrator (e); but perhaps the intestate had no debts due to him, but only money and goods in possession, and then the administrator hath no occasion for the letters; for if he be defendant in any action, he need not shew them, much less need a vendee, or any other person claiming under him who is not privy, and therefore (by the law) is not supposed to have the custody of them, and this is resolved in *Plowd.* 276, 277. a. So that as to the defendant, it is not material, whether there be letters or no, because not obliged to shew them further.

The fact, whether a person is administrator shall be tried by jury, and not by certificate.

Suppose the widow's being administrator be traversed, it is a matter *in fact*, and shall be tried *per pais*, 9 Co. 10. and not by certificate from the ordinary (and if that were, THE REGISTER would be sufficient ground for him to certify that it was granted) and there is no doubt but THE REGISTER (as it may be brought for evidence) so it will be allowed good evidence at the trial. Suppose again, that letters be thereon, I traverse them as forged, then I think THE REGISTER is the only proof, for or against; if not registered, the issue must be found for me, for what other way of proof? put the case, that the letters of administration be lost through the carelessness of the administrator, must the vendees * and releasees be undone? Here in our case all other dues and rites are rightly performed, and here is no fraud in the case, so as to make it void by 34 *Eliz.* c. 8.

* [409]

The ordinary may grant several administrations of different parts of the intestate's effects.

1 Roll. Abr.

908.

1 Salk. 36. 2 Vern. 514. 1 Sid. 100.

Then as to the regularity of it, that needs not always be so precisely observed and followed, for the ordinary may grant several administrations of several parts of the intestate's goods, 18 *Hen.* 6. pl. 22. b. He may grant it upon condition, *Rolls Abr. tit. "Executor."* He may grant it for a particular time, as till, &c. And all these are good.

The statutes which authorize the ordinary to grant administration, do not direct that it shall be granted by *latus*.

Then lastly, let us consider the statutes; whether any of them oblige him to grant them *by letters*, and no other way. The first statute that I know of, was 13 *Edw.* 1. which we call *Westminster the Second*, cap. 19. This is the first, but mentions not administration, for it only renders the ordinary liable to debt, as an executor, for all the goods that come to his hands, and my LORD COKE, 2 *Inst.* 397. tell us, this was only in affirmance of the common law; though by the by I conceive otherwise, it being *de cetero*, which he himself says in those ancient statutes, signifies for the fu-

(e) But by the 16 & 17 Car. 2. c. 8. and 4 Ann. c. 16. no judgment shall be stayed for default of alleging the bringing into court of letters testamentary or letters of administration, unless specially and particularly set down and shewn for cause of demurrer:—and as an administrator who recovers a judgment for a debt due to the

intestate need not declare as administrator on the judgment, but may bring the action in his own name. *Bonafus v. Walker*, 2 *Term Rep.* 126. it is no objection on special demurrer, although he do declare as administrator that he has not made a present of the letters of administration, *Crawford v. Whitall*, Dougl. 4. *notis*.

ture,

ture, or from hence forward, which to my reason seems plainly to imply, it was not so before. But this is not much to our purpose, therefore let us consider the next, which is the 31 *Edw. 3.* chap. 11. which is only thus; that the ordinary shall depute the next and most lawful friend of the intestate to administer his goods, which deputy shall have the benefit, and incur the charge of an executor; so that this also mentions nothing of the manner of deputing these administrators, whether it shall be by letters, or by registering them, or by parol; this therefore can sway nothing. As for the 21 *Hen. 8.* c. that only limits and determines to whom administration shall be committed, and enacts nothing about the manner of granting them. As for the 37 *Hen. 8.* 19. that only gives doctors of the civil law power to exercise jurisdiction ecclesiastical, and therefore matters nothing. As for the 34 *Eliz.* that is only about administration gotten by fraud for deceit of creditors; so that the manner of granting administration is not settled by the statutes; for the 31 *Edw. 3.* which is the principal, and gives them the authority, saith, only makes deputies, and that may be by the registering of it, &c. So that on the whole, no statute being against me, neither directly nor indirectly, and the ordinary's authority, and *Godolphin's* opinion, and the reason of the thing being for me, I think, doth need no more; yet too much being always less perilous than too little, I shall say somewhat more of this, because of the other I have no great scruple. In *Styles's Register*, tit. "Administration," we find it resolved in 22 *Car. 1.* that letters of administration may be revoked by a revocation without a seal: now from hence I would argue, that administration * may be granted, and not under seal, for *unumquodque dissolvitur eo modo quo creatur*, and consequently after the same manner in which a thing may be dissolved, it may be created, for if an administration never be granted but under seal, I think it could never be revoked but under seal; and so it is in case of a will, it cannot be made but in writing, and therefore cannot be revoked but in writing, by the late statute. I shall no longer insist on this, but conclude the point upon what hath been said already, that the administration was well committed.

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SECONDLY, Let us consider the second administration to *E.* if he by this can avoid the sale by *C.* to *D.* And I HOLD the sale good against him. And here it may be well observed, that it hath been often adjudged, that when once administration is granted to a right person, unless a will appear or the like, the ordinary cannot at his pleasure revoke it and commit it a-new to another, especially not so as to avoid all acts done by the former administrator, for thence would ensue much confusion. (*f*) But ours is not revoked, nor any other granted in the life-time of *C.* I do readily yield *Greisbrook's* case in *Plowden*, to be law, that if administration be committed, and

An administrator to whom administration was committed by parol only, and before the executor named in the will had refused, sells the goods of the deceased, and then the executor refuses, and the administrator

tor dies, and administration *de bonis non*, is granted. *Quere*, if the sale made by the first executor be good. *Plowd.* 280. 1 *Leon* 90. 6 *Co.* 19. 2 *Lev.* 183.

(*f*) *Ray.* 93. 1 *Sid.* 179. 293. 372. 1 *Lev.* 158. 186. 305.

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he sell goods, and afterwards a will be proved, the executor may avoid the sale, by bringing a *detinue* against the vendee; but I could never find that an administrator might avoid a sale. And it is to be noted in our case, that C. dies, and her administration is never repealed nor declared void by sentence, and so it may be well intended that E. is only administrator *de bonis non*, &c. And then I am sure he can never avoid the sale, unless it were fraudulent, which is not supposed in the case. In that of *Piruden*, the probate hath relation to the death, and so avoids all administrations and acts done by them; but here an administrator dies, and administration is committed to another; though the first were void (which doth not appear) yet I conceive clearly the second cannot avoid all mean acts as an executor can: again, C. our administrator hath good authority to sell, till her administration be revoked, especially against all claiming under the ordinary, as the plaintiff doth, therefore I think the sale good. The very case at bar we find *in terminis* in *Gulston and Glifon's Epitome* of the Common Law, title "*Trespass*," page 408. where are these words, if administration be committed by word to A. who sells goods to B. and dies, and administration is committed to C. *quere* if C. shall have trespass for the goods sold. Thus he * makes it a *quere*, but then answers it himself in these words, "It seems he shall not, for A. had authority as it seems to sell." Now here is no mention of its entry in THE REGISTER: if without it, when only by word of mouth, the sale seems good, then with it it is certainly good, as *Godolphin* saith. Further, though it be true that an executor or administrator may have trespass for goods taken before the administration granted, yet he cannot have it against him that justifies under the ordinary, for such a one is administrator *pro tempore*, 18 *Hen. 6. pl. 22. pl. 7.* 36 *Hen. 6. pl. 8.* Now we claim the goods by sale from one who had power to make it, by virtue of an administration from the ordinary. We have later cases too; first, the case of *Packman*, 6 *Cr. 18, 19.* where administration is committed to a stranger, and the next of kin sues a citation to have the former repealed, pending the suit the administrator sells the goods, the administration is repealed, yet it is resolved that the first had the absolute property of the goods in him, and he might sell them to whom he would; and though there be a revocation, yet the sale stands good, though it were pending the suit, which ours is not, nor is ours ever revoked: if administration be granted upon condition, and the administrator sells the goods, the condition is broken, yet the sale stands good, *ibid.* And as in these cases the administration was lawful, till countermanded; so I hope on the whole you will conceive ours, it being to the next of kin too; for *Packman's case* is much stronger than ours, the administration being to a stranger, and the sale being pending the suit. Supposing the administration void to C. yet she only was liable as executor *de jure tort* is, and not the vendee. For if another doth take the deceased's goods and sell, or give them to me, this shall charge him as executor *de jure tort*, and not me: nay, if he that from the ordinary hath authority by letters, *ad colligend' et vendend' bona peritura*, and do sell or dispose of any goods, though otherwise subject to perishing,

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1 Com. Dig.
264.

it makes him executor *de son tort*, though he had authority from the ordinary to do so, and the vendee is not liable, *Dyer* 105. 166. and 256. Now I take the law to be clear, as it is in these cases, yet the vendee of an executor *de son tort*, is not liable to trespass for goods bought of such executors. The application of this to our case is easy and natural; so that if the first administration be void without repeal or sentence declaratory, then the action is not well brought against the vendee, but ought to have been brought against C. as executrix *de son tort*. If it be not void, but only voidable, then all acts done by her till it is avoided, stand good. If * neither void nor voidable, then there is not the least scruple but the sale is good, therefore take it which way you will, the action of trespass lies not against the vendee. This you may see in *Prince's case*, 5 Co. 29. (g) *Needham's case*, 8 Co. 35. (b) And *Dr. Drury's case*, 8 Co. 141. (i).

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Many other things might be added, but this I think may satisfy at present; and therefore upon what hath been said, I humbly pray judgment for the defendant.

B. S.

October 3, 1679.

(g) S. C. Godol. 236. And. 132.
Hughes Ent. 280.

(b) S. C. Godol. 71. 237.
(i) S. C. Hughes Ent. 2.

* Trinity Term,

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The Fourth of William and Mary,

IN

THE KING'S BENCH.

Thursday, the 14th June, 1694.

Sir JOHN HOLT, Knt. Chief Justice.

Sir WILLIAM DOLBEN, Knt. }

Sir WILLIAM GREGORY, Knt. } Justices.

Sir GILES EYRES, Knt. }

Sir GEORGE TREBY, Knt. Attorney General.

Sir JOHN SOMERS, Knt. Solicitor General.

The King and Queen against the Bishop of London and Case 260.
Peter Burch, S. T. P.

Hilary Term, 3 William and Mary, Roll 965.

THIS day this cause came to be argued for the presentation
hac vice to the rectory of *St. James's*, in the liberty of *West-*
minster.

SIR BARTHOLOMEW SHOWER, who argued for the defendants,
it resting upon their demurrer to their majesties count upon the
quare impedit, opened the record at large, and then proceeded in his
argument thus.

erected in *St. James's*; and that the *bishop of London* and *Lord Fermyn*, shall present to such new church by
turns; that the then incumbent shall be rector of the new parish; and that, on the first avoidance, the *bishop*
shall present, and on the next, *Lord Fermyn* and his heirs, and so *alternis vicibus* for ever. If the in-
cumbent be promoted to a bishoprick, by which promotion the church becomes void, THE KING by his
prerogative, and not THE BISHOP by virtue of the statute, shall present; for although it is a new church,
yet it is subject, in this respect, to the like incidents as other churches. S. C. Post 441. 493. 501.
S. C. 3 Lev. 377. S. C. Lev. Ent. 344. S. C. 4 Mod. 200. S. C. 1 Jones 404. S. C. Comb. 205. 300.
S. C. Carth. 313. S. C. 2 Salk. 540. 559. S. C. Holt 585. 3 Com. Dig. 198. 4 Bac. Abr. 200.

The statute
1 Jac. 2. c. 22.
enacts that the
parish of *St.*
James shall be
divided from
the parish of
St. Martin;
that a new
church shall be

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MY LORD, I shall not at present meddle with any thing that relates to the other case of *St. Martin*, as to the point which was over-ruled by the Court, that the king hath such a prerogative in ordinary cases. But that which we humbly insist upon is, that this case is not within the reach or extent of this prerogative. And this, with submission, doth appear of MR. ATTORNEY'S own shewing in his declaration here on the king's behalf; he hath set it forth to be a parish newly created by act of parliament, and a thing not in *esse* before. And it appears by the declaration what that act is, and you must take it as it is there set forth. We have demurred to the declaration, and if upon that act it doth appear that there is no right doth accrue to the king • to present to this upon this avoidance, then your judgment must and will be for the defendants. Mr. Attorney, MY LORD, has agreed, by his writ and count, that it is *an avoidance* within this act of parliament, upon the promotion of *Dr. Tennison*; and he doth likewise admit and agree, that the king is not patron of this benefice of *St. James's*; and that this act hath given no right to the king to any turn or presentment; for it is to be by the *bishop of London*, and the *Lord Jernyn*. He doth also admit by this declaration, that *Dr. Tennison* was never presented to this living: and admits, he comes not in by virtue of any presentation from any particular patron, nor indeed by any sort of presentation whatsoever; and that this parish church was never presented to by any person at all. But he concludes, that now it is void, the king has a right to present to it by force of his prerogative upon this avoidance, though the act says "*the bishop shall present after the decease of Dr. Tennison, or the next avoidance.*" Then, MY LORD, the question is, whether this prerogative can operate upon this vacancy of this benefice thus filled, and thus avoided, against the express words of an act of parliament; which words are, "*That the bishop shall present after the decease of Dr. Tennison, or the next avoidance.*" My Lord, I must crave leave to repeat the words of the act; and they are to this effect; that all that precinct, or district of ground within the bounds and limits there mentioned from thenceforth, should be a parish of itself, by the name of the parish of *St. James's*, within the liberties of *Westminster*, and a church thereupon built is dedicated by the act to divine service, and that there should be a rector to have the cure of souls inhabiting there; and then after a full commendation of the merits and service of *Dr. Tennison* in that place (the now reverend *bishop of Lincoln*) it doth enact and ordain him to be the first rector of the same; and that the doctor and his successors, rectors of the said parish, should be incorporated, and have a perpetual capacity and succession by the name of RECTOR of the said parish, and sue and be sued, and hold and purchase lands for ever, over and above what is settled by the act, not exceeding two hundred pounds *per annum*. And then it enacts "that the patronage or presentation after the death of the rector or avoidance, shall belong and appertain to, and by the act, be vested in the *bishop of London* for the time being and his successors, and *Thomas Lord Jernyn*, and his heirs for ever." So • then, MY LORD, here is a patronage given by act of parliament; and by the way I would observe that it is not a fixed patronage till after the

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the vacancy; nay, that it is no patronage at all, for there is no word of present vesting it, and then I am sure the king's prerogative can have no operation upon any benefice till after it become an advowson. Then, my lord, this law enacts, that the first rector, after such a decease or vacancy, shall be presented or collated by the bishop for the time being, and the next to succeed him by the *Lord Fermyn* and his heirs; the two next by *the bishop*, and the next by my *Lord Fermyn*; and so twice by *the bishop*, and once by the *Lord Fermyn* for ever. This is the act, and I would beg leave to make four or five observations upon it.

FIRST, My Lord, it is a new law; in the whole it is a new parish; it is a new advowson; nor (with submission) is it any advowson till after the avoidance. Nay by the words of the act (if there can be any difference in an instant) between "at," and "after" as in our law in several cases it is allowed as "*per mortem*" and "*post mortem*," &c. it is no advowson till after the avoidance, for so are the words; "after the death and avoidance of *Dr. Tennison*, "the advowson, patronage, and presentation shall be vested in *the bishop* and the *Lord Fermyn*;" and till then, they are vested in no body, and that which is in no body, is no where at all; and it is vain to say, that that exists which is in *abeyance*, as sometimes for necessity sake we do; for that is almost the same thing, as to say that the thing is not; but to say that an advowson shall be in *abeyance* before it is created and vested, must favour something of absurdity.

SECONDLY, *Dr. Tennison* comes not into this rectory by our presentation, but by the donation of the act of parliament, and the king has no prerogative in the case of a *donative* upon a promotion, nor is there any precedents of such a thing; the king cannot present to that which the patron could not have presented to; and the patron could not present to a donative *quasi a donative*; for for him to present to it, is to make it presentative; it is to alter the nature of the thing, and so injures the patron, and yet a donative with cure of souls, will be void by a promotion of the incumbent, as appears, *Yeku. 61. 2 Rolls Abr. 341*. And this is further evident, MY LORD, from the pretended notion and reason of this prerogative; for here is an incumbency by the gift of king, lords, and commons; and then consider what this prerogative is; as it is stated in the books, it is a prerogative to present upon the promoting of the patron's presentee, * or of the incumbent by his grantee, and in his right, to a greater dignity in the church. And when they would avoid the objection that the king could do no wrong, they say there is no injury, but a kindness to the patron, because it is a kindness to his friend, being preferred to a higher degree of honour and state in the church; all which fail here; and there is no reason for the exercise of this prerogative, as there is in the other case. It is a good argument, according to Mr. LITTLETON, because no such thing ever was before, therefore of right no such thing ought to be. Novelty is always an argument against the right pretended to; and

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because this is in the case of a gift by act of parliament, there is no reason it should be allowed for a prerogative that was never used; and in propriety of speech can never be called a prerogative; much less if there be no practice or precedent to warrant the claim in the case of any donative. MY LORD, *prima facie* we have the right: to avoid that right of ours is this prerogative set up. Now they ought to demonstrate, that there is such a prerogative to controul our right in this case, and the arguments ought to be convincing and undoubted; and it is no consequence, that because where a patron's incumbent is preferred by being consecrated a bishop the king shall present, [that where the parliament's incumbent is preferred the patron should lose his benefit; because the cases are not the same, for the supposed recompence and consideration in the one case will not hold in the other. And we are not here in the consideration of a prerogative incident to the crown for the benefit of the government; nor is it a prerogative which respects the continuance or improvement of the treasury; so as for the benefit of the kingdom, and extending or enlarging of it beyond the former practice, should seem needful, and therefore the common pretences of presumption and intendment are no more on their side than they are on ours; nay, it is rather on our side who have common right to present; and we insist (with submission) on the act of parliament in this case, and that there is neither record, nor book case, nor judicial opinion, nor any instance in history or tradition, that there was ever any such prerogative in the king, or practised by him; we say that there never was a particular case wherein the king did so present. And, MY LORD, it is no objection to say, that there never was any such promotion or avoidance before this. Whether there was or no, I shall not pretend to answer; but that turns upon them, for that shews there never was any exercise of such a prerogative * presentation in fact, as they now contend for; an argument *a simili* is the weakest of arguments; but I say they have no case like this; nay, they have no book declaring on their side; the books say, that it is only to present to a benefice vacant by promotion that was antecedently presentable. But here the doctor is so far from coming in by our presentation, that he is here in by the whole kingdom as patron, and all that they can pretend is when a man is dignified by promotion who came in by presentation, admission, institution, and induction, or by collation and induction, which is all one, and no otherwise. MY LORD, we have had many new parishes created, and we never read, I can say it, I never read, that this prerogative was ever extended to them, not so much as in a moot case, or any extrajudicial opinion of any judge, or any reader upon a statute. I am not to dispute when the prerogative shall commence, or begin in this church, or if ever; it is time enough to dispute that when another occasion offers itself upon the preferment of my client, or his successor; it suffices me to argue, whether in this case the king shall have a prerogative to prevent the next turn belonging to the bishop. Next, MY LORD, that which is considerable is, that this benefice is not an advowson created as others usually are, for it is to commence *de futuro*; and besides it differs from all others in other respects;

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respects; the same person is made a pluralist by act of parliament, though the act itself says, the parish was too big for one: and it differs in other things; the rector is made a corporation capable of suing, and being sued, and of receiving and purchasing lands to such a value. I offer this only to shew that it is not a common ordinary rectory. Next, MY LORD, I would further observe, that this turn which we claim is not a patronage turn, for it must be admitted that this act vests the fee-simple of the advowson in *the bishop* and my *Lord Fermyn*, and their respective heirs and successors by turns; and so the succession is enacted to be for ever: now this is none of those patronage successive turns, but a particular presentation, which is given to the *bishop of London* by express limitation. And the words and penning are different; that which gives the patronage, and that which gives the presentation; the first is in the bishop, the other is by turns; so that there are no words in the first presentation, which look like a gift of an estate in the patronage, but only one first particular presentation given to the bishop more than ordinary; this is not to be a turn which he is to have as patron; but first he is to have one presentation before it comes in to the form and manner of turns * prescribed by the act, to wit, in perpetual succession; for if otherwise the patronage would be to *the bishop* three turns in four to one of my *Lord Fermyn*. And then as for their objection, that a patronage newly created, shall be in the same plight, and under the same rules and circumstances as another, that objection can never take place here, because it can never take place, till it become a patronage, which was not, nor can be till it hath been presented to, nor where a particular presentation is at first given by express words. Suppose the act had said, that the patronage should, after the death or avoidance of *Dr. Tennison*, be vested in *A. B.* but that the first rector should, upon that avoidance, be presented by *C.* a third person; this would never be reckoned a common ordinary turn subject to the like prerogative as others; here the bishop doth not claim this particular presentation in right of patronage, but by express gift by act of parliament. And then, MY LORD, I insist upon this, that this act binds the king in point of interest and prerogative, for every act of parliament binds all persons, and includes their assent past, present, and to come, as my LORD HOBART says, and it has the royal assent, and binds the king and his successors, as well as the subject: suppose then the king had been patron of *St. Martin's* in his own right; I dare say, they would not contend, but that this act thus creating a new parish, a new rectory, and new patrons, would have bound the king, if the act had given the patronage to another. But this is not so much; for the question strictly and properly here is not, whether the king shall not be bound by this act, because he is not named, but whether this prerogative shall hold place upon a vacancy by this promotion of an incumbent made by this act, never presented, collated, instituted, or inducted, and where the first presentation is by the same act given to a particular person? and the king is as much bound by this act, as to prerogative, as he would have been, had he been particular patron of the church, out of which the new parish is taken. And here the king himself gives the first presentation to the bishop of *London*; for the king and people all to-

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gether are grantors. Then, supposing such a right as this, in a subject, and the subject were able to prescribe for it, he must then have set forth that, time out of mind, whensoever the incumbent of another's presentation was presented by him to another living, he should have the presentation *ea vice*, this is the most that ever can be made of this prerogative: now no body would say that this case falls out to be under such a prescription or the reason of * it; and as for the prerogative, though it be part of the law, yet every prerogative hath its boundaries and limits, and a reason for it too; and that which is not within the reason, is not within the limits, or else it is no prerogative that the law allows. Suppose that we turn this argument into the manner of querying or interrogating, according to the practice of THE CIVILIANS, what if the avoidance be by promotion? the words of the act are a natural answer to that quere, that the rector shall have the first incumbency by presentation of the bishop, and that is the opinion of the act, of the king, and parliament. But MR. ATTORNEY says no; the king shall have it by prerogative. Besides, we know there was good reason in fact for this provision, for the bishop was patron originally of the parish of *St. Martin's*, out of which this new parish is taken, and there being possibly a reason why he should have the first presentation, when it was taken out of the parish of which he was the original patron, and a third presentation given away to a stranger, it shews it was a particular designed kindness in the parliament, to the bishop, in recompence of dividing his parish. And then, MY LORD, there is another thing considerable, to shew that there is no need to strain the prerogative here; for one and the same person being parson, and incumbent of both parishes, the king has had the effect of his prerogative upon the promotion of this very incumbent; for the king has presented to that church into which he came, by presentation and induction; but here we insist upon it that the prerogative cannot operate, because he came into this living, not by donation of the patron, but of the parliament, and consequently, as I said, of the king himself: besides, this act of parliament giving the first presentation in this manner, it does of itself bind and foreclose the prerogative, being introductive of a new law, and of a new law upon a new subject, it implies a negative of every thing, which is contrary to the purview of this act; and it is no objection to say, that the king is not obliged by it, if he be not named, for there are numerous cases in our books that prove him bound, though even where he is not named; all that tend to the promotion, and prevent the decay of religion. So is 5 Co. 14. and 11 Co. 68. So by all the acts that are to give speedy remedy against wrong; he is bound by the statute of *Marlbridge*, cap. 22. against distraining tenants to answer without writ, as the 2 *Inst.* 142. and 169. And by the statute of 32 Hen. 8. c. 28. concerning discontinuances, 2 *Inst.* 681, and 682. because they are made to give her who had * a right a more speedy remedy, to wit, by entry; where at the common law, she is forced to a real action; so is *Barkley's case*, *Plowd.* 233. 1 Co. 44. Co. Lit. 116. The king is bound by the statute *de donis*, and the reason given is, because an alienation would be a wrong to the subject;

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subject; therefore, unquestionably the king is bound by this act; for here would be an injury to the bishop by the loss of his presentation upon this prerogative. And, it is now no objection, that this law is in the affirmative, because it is introductive of a new law in the very subject matter, created *de novo*; before the act the king had no right, and if he had none before, he can only have it now, how and when the act gives it; not contrary to it, *Bro. tit. "Remitter"* 49. agreed 1 Co. 48. and 2 Co. 46. If lands be given in fee, to one who was tenant in tail, his issue shall not be remitted, because the latter act takes away the force of the statute *de donis*. Supposing we had been enacted to be the patron of this living, and it had existed before, and we had been before patrons in another nature, then there had been no remitter, because as to particulars the act is like a judgment, and stops all parties to claim, otherwise than as by the act, though that of remitter be a title favoured in law. Then if we have this only by force of this new act, and another should present in our turn so given, it would be an injury if a subject did it; and consequently the king cannot do it; for the prerogative which this act gives, or which the common law gives, not inconsistent with, or contradictory to the particular provision of this act, is not yet come to take place. Though this be an affirmative law, yet being introductive, or creative of a new thing according to the rule in *Hob. 208.* in the case of *Slade v. Drake*, if the subject matter be new and introductive of a new thing, it implies a negative of all that is not in the purview. (a) The 31 *Edu. 3. c. 12.* that prescribes the form of redressing error in the court of exchequer before the treasurer, is held to exclude all other methods, being introductive of a new law; and so was it resolved in the case of the *Lord Macklesfield*; and though it be a particular expression affirmative, yet it implies a general negative too; for both can never take place. And then I would observe, that all prescriptions and customs will be foreclosed by a new act of parliament, unless saved; and there is the same reason that the prerogative should be, for it is so in the king's manors, as well as the manors of the subject. As to customs, I agree that a man may prescribe * to have a custom against an act of parliament, when his prescription is saved by that, or another act; so is the 1 *Instit. 115.* But regularly a man cannot prescribe to, or alledge a custom against, an act of parliament, because it is a matter of record, and the highest record that we know of. Supposing, that by a bye law money was payable annually, and one and twenty days of grace, notwithstanding any custom for the making of such a bye law; if an act come and say that it shall be paid quarterly, by even portions, this will alter the law. I must agree that a consistent devise or statute, is no repeal or revocation; but if the new act give a new estate, as in this case, the latter shall controul the former; for this amounts to a repeal; and so the lords held it, as it was held in this court, in the case of the clerk of the peace, between *Fox v. Harcourt*: in the case of

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(a) Plowd. 113. 206. 4 Co. 59. 461. 1 Ld. R.
Show. Parl. Cal. 175. 3 Petr. Wms. 6. 340. 95. 3 Term Rep.
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ter's case, 11 Co. 59, the question was upon the statutes of recusancy, whether a man might be prosecuted for both the penalties: and it is held he might, because the acts were consistent; but there the rule is taken and agreed. If an act of parliament give a power or an interest to one person, there by that express designation, all others are excluded; and so in case of estates, the same must hold; as is cited in the case of *Stradley v. Townsend*, *Plowden* 206. and 113; and in *Gregory's case*, 6 Co. 19. the same rules are taken and agreed, that a latter statute in the affirmative shall not controul a former law, if the first be particular, and the latter general; which implies the contrary if the fact were otherwise, as it is here. The case there was about the weaving of cloth, not having served seven years as an apprentice, against the statute of *Philip and Mary*; and the question was, whether the statute of 5 *Eliz. c. 4.* had repealed it; and agreed it did not, because the former was particular, and the latter general; but if the former had been general, and the latter particular, the latter would controul it; and the same rule holds in the case of the king, as in the archbishop of *Canterbury's case*, 2 Co. 46. *Hob.* 310. The question was if lands came to the king by 31 *Hen. 8. c. 13.* or by 10 *Edw. 6. c.*; and it was objected that the latter was in the affirmative; and yet held it came by the latter, because though they were affirmative words, yet the latter were differently penned, and the last being of as high authority as the former, the latter act shall take place. Now, MY LORD, suppose I should admit that there should be no contradiction for the king to have the like prerogative prevail * where the act of parliament generally limits the presentation, as where it was anciently presentable, because there the king may have such a prerogative, and a man still be a patron of the living, as he was before; yet here it will not do, because the king can never have this presentation and the bishop too, and being particularly vested for the first presentation in the bishop, it must go according to the act. Therefore, there is a vast difference now, between the reason of the one case and the other, when the patronage comes to be in exercise, and when a particular presentation to the living is given by express words of the act of parliament; as for instance, in an act where churches are united; as that for rebuilding the churches in *London*, there it is ordered that the first presentation should be by the true patron of the living, of the highest value in the king's books; suppose then, the king happened to be a patron of the living (of the lesser value) as he is of many in *London*; there it is held, and hath been practised, that the king could not have his common prerogative of the first presentation, which he hath in all other cases, where his interest is intermixed with others, as in the case of coparcenary, where the youngest is in ward, he shall present first, though by the common law, the eldest is to have the first turn; but where an act of parliament prescribes a particular way, though in the affirmative, the method limited in the affirmative shall take place, and shall controul the common prerogative, which the king would have of being preferred in interest, before any others; and I cannot see but it must be the same in this case;

case: and for a precedent there was *Mr. Crooke's case* (b), for *Woodstreet*, in *Doctor's Commons*, before the delegates, and upon advice, the king's presentee acquiesced. MY LORD, you will consider the reason how the king comes to be exempt out of an act of parliament; it can only be by construction of law; now that construction shall never be against the express words, sense, and reason of the act, either plainly expressed in it, or plainly inferable from it; now, here are the express words, and the intent of the act both concurring; and then there is a great deal of reason for the making such a construction as this we would have; that it is an act for the promoting of religion, and then it should have bound the interest of the king: if he had been patron of the parish of *St. Martin*, then, with submission, it will bind the prerogative, though I suppose for the present, that the prerogative should operate, if it were an ordinary turn of a presentation. Therefore, to say, the king shall have such a prerogative in such a case as this, is to do wrong, and to deny the words of the act, which * expressly says, the bishop shall have it; and the king and he both cannot; besides, our presentee was never preferred by the king, which is the reason of the prerogative. And again, MY LORD, with submission, *first fruits* and *tithes* are not reserved out of this parish, as they are now in ordinary livings, and therefore not demandable, because there is no saving in the act for the king's right; and I do not doubt but they will say, that *first fruits* and *tithes* are due to the king by common law, though the *quantum* be settled by the act of parliament, and they were sharp enough in the late reigns to have exacted it, but it was denied in both houses to be inserted in this, though it be in other acts; for erecting of new parishes there is generally such a saving, as in the act of *St. John at Wapping*, and that I mention of rebuilding the churches of *London* after the fire, there are express provisions and savings, which shews that such a saving is necessary. And the statute of 25 *Hen. 8. c. 1.* which gave and annexed them to the crown, has been declared to be affirmative of the common law, and then there is as much reason to argue that a saving should be as necessary for this prerogative, as for that other right. MY LORD, until it is once presented to, it cannot be subject to that prerogative (which for the present I will not dispute against) because the court seems to rely upon the authority of *Woodley's case*, but yet that can be no objection, for it is plainly distinguishable from the case of a grantee of the next avoidance, who comes in the case of the grantor, and takes his grant, subject to all incumbrances and titles his grantor was subject to. Our's is now first by the act of parliament, their's is by avoidance, by the promotion of one presented by him that claimed under the patron, and that is the same as if he had been presented by himself; this case is not so, for we cannot say he is presentee to us, or any other that claims under us. Supposing the act had expressly declared that *Dr. Burch* should have been collated by the bishop, to this living, upon the first avoidance, then they scarce will pretend that this prerogative should take

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(b) Ante, page 208.

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hold of it, upon the promotion of *Dr. Tennison*. They say, indeed, no grant but must come under the contingency of this prerogative; but they say an act of parliament cannot alter it, so that it is not applicable to our case, either in respect of the limitation, nor of the king's prerogative at large. It has been insisted on, that the difference is trifling between this and the other case of *Dr. Lancaster*; nay it has been said, that this was a sticking in the bark; and the opinion on their side is a *notissimum*, so that it was below the dignity of this court * to have an argument about it; and that it was not the intent of the law to exempt this living from the common case of others; and that the question is not, whether the words of an act shall bind against the general reason of the law which is for the prerogative. MY LORD, we insist upon it, it was the intent of this act to difference it in this, as it hath differenced it in several other particulars; however it suffices, that the first presentation is by express words exempt, else their kindness to the *bishop of London* was frustrate. They say, there would have been special, and other words used, if what I argue for had been intended: but that will not reach to this first presentation whatsoever it may to any afterwards; and likewise we return the argument, and say, if the contrary had been intended, other words, and contrary words would have been used. And, MY LORD, it is no argument to say, that if a vacancy had been in the see of *London*, and the temporalities in the king's hands, then the king must have presented, and not the bishop; that would by no means contradict the act, so much as this doth, for that had been the same, as if the bishop had done it, for then the king for that time was in *locis ordinarii*, and has all the benefits as he had. And to suppose, that if my *Lord Fermyn* had been attainted of treason, the king should present, it would be contrary to the words of this act; that is no argument neither, for in the case of attainder, the king claims in the right of the person so attainted, and therefore it is no conclusion against us neither, nor indeed any conclusion at all. And for the objection if an estate tail be given by act of parliament it is dockable, that is not any argument in this case neither; for suppose an act of parliament say, that *A.* shall have the manor of *D.* for and during his life, and after his decease, it shall descend to, or be enjoyed by *C.* or by the eldest son of the body of *A.* that shall be then living, will any man say that against these words, any act of *A.* shall prevent an enjoyment according to the act; nor can any thing *Dr. Tennison* doth or agrees to (as no question he doth to his own promotion) hinder the operation of the act of parliament. And though it is but a general argument, that the *bishop of London* has no more right than the common grantee of the next avoidance has by his grant, that is no close reasoning, for there is some difference between the one and the other; for in our case we claim under an act of parliament, that can change, alter, annul, abridge, diminish, qualify, enlarge, or transfer any common * law right; and then here is *particularis designatio*, which is always *exclusio alterius*, an act of parliament having the common law and the prerogative too under its controul. And to evidence, that the prerogative is not so much valued

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valued in law, as an interest the king hath, we may see *Baskervill's case*, 7 Co. 28. If the king has the title to present by lapse, and the patron presents, and his presentee is admitted, instituted, and inducted, and dieth, the king has lost his turn; for *nullum tempus occurrit regi* extends only where he has an interest certain and permanent, not to a limited prerogative title. MY LORD, we have all the common topics of argument on our side, that the king's prerogative is bound, because not saved, and the act is for the benefit of the church, and that which we humbly insist upon is this, that not only this is a new law, and inconsistent with the former, as to persons and things, but that this avoidance is upon the promotion of a person never presented by us, but who comes in by act of parliament; and they can shew no precedent for the prerogative in this case neither; and if it be, that he hath a prerogative in ordinary cases to present, he ought not here when we claim under an express particular limitation by particular words. Suppose it had been given to the *archbishop of York*, who never had any thing to do in the living before, he had had as much right to present as the *bishop of London* has now, and that we take to be good; and the same act which made it at first a parish, is that which gives the first presentation in a particular express way, and it would be the same if it were given to a stranger, and that construing it as they would have it, to leave a loophole for this prerogative to get in at, is to overthrow the intention of it. And for these reasons we pray your judgment for the defendant.



* Hilary Term,

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The Fourth and Fifth of William and
Mary,

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THE KING'S AND QUEEN'S
BENCH.

Wednesday, the 8th February, 1692.

Harcourt against Fox.

Case 261.

SIR THOMAS POWIS. My lord, I am of counsel in that
case for the plaintiff.

DOLBEN Justice. Then go on.

SIR THOMAS POWIS. May it please your lordship, *Simon Harcourt, Esq;* is plaintiff, and *John Fox Esq;* is defendant. This is an action upon the case brought by way of *indebitatus assumpsit* by the plaintiff against the defendant for forty shillings by the defendant, had and received for the plaintiff's use; there is *non assumpsit* pleaded, and upon the trial of that issue, there was a special verdict found at the *nisi prius* before your lordship, and in that special verdict, the jury find,—FIRST, the statute of 37 Hen. 8. c. 1. intituled, "A BILL for *custos rotulorum* and clerkship of the peace." And then the verdict goes on, and finds the act of parliament made in the first year of king William and queen Mary, intituled, "AN ACT for enabling lords commissioners for THE GREAT SEAL, to execute the office of lord chancellor, or lord keeper," and the verdict doth likewise find several clauses in this last act that particularly relate to the offices of *custos rotulorum*, and clerk of the

By 37 Hen. 8. c. 1. the *custos rotulorum* hath the appointing of the clerk of the peace: and by 1 Will. & Mary, c. 21. f. 5. he is authorised, when ever the office shall be void, to appoint "one able and sufficient person residing in the county or place, to execute the same by himself or his sufficient deputy, and to take and receive the fees thereof

"for so long time only as such clerk of the peace shall well demean himself in his said office," and gives the sessions authority to discharge him for misbehaviour and appoint another. AN APPOINTMENT made by a *custos rotulorum* pursuant to these statutes is, as to him, an appointment for life; and therefore the office does not become void on the *custos* being removed; nor can the succeeding *custos* remove a clerk of the peace so appointed, and appoint another. —S. C. Post, 506. 516. 556. S. C. 4 Mod. 167. S. C. Comb. 209. S. C. Show. P. C. 158. S. C. 12 Mod. 42. S. C. Holt. 189. S. C. Ld. Ray. 161. Ante, 282. 2 Hawk. P. C. 67. 6 Mod. 193. 4 Mod. 32. 4 Com. Dig. 154.

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peace. Then * they find, that the right honourable JOHN earl of Clare was by letters patents from this king and queen, dated the 9th day of July, in the first year of their reign, according to the statute of 37 Hen. 8. c. 1. made *custos rotulorum* for the county of *Middlesex*, and they set forth the letters patents in *hæc verba*. They next find, that the office of clerk of the peace for this county being then void, the *Earl of Clare* by writing under his hand and seal the 19th of July, 1 Will. & Mary, did nominate, appoint and constitute the plaintiff, Mr. Harcourt, to be clerk of the peace for *Middlesex*, for so long time only, as he should well demean himself therein, and the instrument is likewise found in *hæc verba*. They also find the plaintiff to be a person capable and sufficient to have and execute this office, and that he did take upon him the execution thereof, and that before he did so, at the quarter sessions for the county in open sessions, he took the oath required by the last mentioned act of this king and queen, and the oath of clerk of the peace, and did do and perform all other things necessary to make him a compleat clerk of the peace, and that during all the time that he did exercise and execute that office, he did well behave himself therein. Then they find, that on the fifth of February, in the third year of the king and queen, the earl of Clare was in due manner removed from the office of *custos rotulorum*, and the right honourable WILLIAM Earl of Bedford was, by letters patents of the king and queen, dated the 6th of February, in the third year of their reign, made *custos rotulorum* for this county, according to the statute of 37 Hen. 8. c. 1. and those letters patents are also found in *hæc verba*. They find, that the *Earl of Bedford* by a writing under his hand and seal, dated the 15th of February, in the fourth year of the king and queen, constituted and appointed the defendant Mr. Fox, to be clerk of the peace for this county, to hold the office for, and during the time that the earl should occupy and exercise the office of *custos rotulorum*, so as he well demean himself therein. They find likewise, that Mr. Fox, the defendant, is a person capable and sufficient to have and exercise the place, and in open sessions did take the oath required in the late act, and did all other things requisite to qualify him for the office, and did thereupon enter upon the execution of it, and, during that time executed it, did well demean himself therein, and did take the fees belonging to the office, which

• [428] they find to be to the value of five shillings. But, * whether or no the plaintiff ought to receive this five shillings against the defendant they cannot tell, but submit that, upon this whole matter thus found, to the court.—MY LORD, I take it, the single question in this case upon special verdict will be, whether or no Mr. Harcourt, who was duly constituted clerk of the peace for the county of *Middlesex* by the *Earl of Clare*, while he was *custos rotulorum*, did thereby become clerk of the peace for life, only removable for misbehaviour, or whether his continuance in that office depended upon the continuance of the *custos* in his office, so as upon his death or removal, the clerkship of the peace was to cease and be determined. And I do take it, with submission, that he was and still is clerk of the peace for his life, only removeable for misdemeanors in his office,

office, and not dependant upon the death, or removal of the *custos rotulorum*.

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To make out this, I shall consider three things:

FIRST, How this matter stood at common law, I mean, before that statute of 37 Hen. 8. c. 1. for strictly speaking, at common law there was neither *custos rotulorum*, nor justice of the peace, nor clerk of the peace.

SECONDLY, How it stood upon that statute, and another which I shall have occasion to take notice of, though not found in the verdict, and that is 3 & 4 Ed. 6. c. 1.—And

THIRDLY, How it now stands at present upon this late act, in the first year of this king and queen about the lords commissioners for the great seal.—Now as to THE

FIRST, I take it, by the common law, and the ancient constitution of the kingdom, all officers of courts of justice, and immediately relating to the execution of justice, were in for their lives, only removeable for misbehaviour in their offices. Not only my lords the judges of the courts in *Westminster Hall* were anciently, as they now are, since the revolution, *quam diu se bene gesserint*, but all the officers of note in the several courts under them were so, and most of them continue so to this day, as the clerks of the crown in this court, and in the chancery, the chief clerk on the civil side in this court, the prothonotaries in the Common Pleas, the master of the office of pleas in the Exchequer, and many others; I think, speaking generally, they were all in for their lives by the common law, and are so still to this day. So * it was, and is with the clerks of assize, and so I take it, before this statute of 37 Hen. 8. c. 1. it was with the clerk of the peace. And in this particular the wisdom of the law is very great; for it was an encouragement to men to fit and prepare themselves for the execution and performances of those offices, that when by such a capacity they had obtained them, they might act in them safely, without fear or dependance upon favour; and when they had served in them faithfully and honestly, and done their duty, they should not be removeable at pleasure. And, on the other side, the people were safe, for injustice, corruption, or other misdemeanors in an office, were sufficient causes for removal and displacing the offender. MY LORD, I shall not enlarge upon this matter; I need not, it being so well known; I do rather but touch upon it, to introduce what I am considering upon this first head, how it stood before this statute, which seems calculated to reduce it to the ancient course; for perhaps affectation of power and unlawful gain, were the mischiefs that occasioned both the acts found in this verdict. But to come to the matter more closely, I take it, that anciently the *custos rotulorum* was in the nomination of the LORD CHANCELLOR or KEEPER, and, I think, as antiently the nomination of the clerk of the peace was in the *custos rotulorum*; but, MY LORD though he was nominated

4 Mod. 169.
3 Bac. Abr.
733.

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by the *custos rotularum*; yet he was not dependent on him, nor removeable upon his death, or removal from the office of *custos rotularum*, and that, I conceive, upon these grounds. FIRST, from an uniformity, (which the law loves and uses) between this officer, and all other officers of this nature, as those I mentioned in this court, and the Common Pleas, in the nomination of the Chief Justice, and more particularly the clerk of assize, who, upon any vacancy, is put in by the senior judge of assize, at that time for that circuit, but yet he is not dependent upon that judge's continuance in his place; for all these, though they be nominated by a particular person, yet when they are in, they are officers of the public, and not of those persons that placed them first in their offices.

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SECONDLY, The next thing I could offer is this, that the clerk of the peace is not the clerk of *the custos*, but of all the justices of the peace in general, and properly clerk of the sessions of the peace. And so expressly the statute of 12 Rich. 2. c. 10. where the law appoints the wages of the justices of the peace at the sessions, it says, "that every justice of the peace * shall take for his wages, for every day of the sessions, four shillings, and their clerk two shillings;" so that this statute doth expressly call the clerk of the peace their clerk. It is true, the *custos rotularum* is usually a person of great quality, and first and most eminent among the justices; as LAMBERT in his *Eirenarcha*, bk. 4. fo. 387. says, and he has the nomination of the clerk of the peace. But, as he afterwards says, folio 394. when he is so nominated, he is not the clerk of the *custos rotularum*, but the clerk of the justices. So, as the clerk of assize, who in the execution of his office, is near of kin to the clerk of the peace, though he be nominated by the senior judge, at the time of the vacancy, yet he is not the clerk of the judge, but of the assizes; so is the clerk of the peace nominated by the *custos*, but is not the clerk of *the custos*, but of the justices in their sessions; and, as the clerk of the assize is not dependent upon the death or removal of him, who put him in, so the clerk of the peace is not dependent upon the death or removal of him, who put him in. I speak now of what was antiently. Nay,

THIRDLY, The clerk of the peace is so far from being the clerk of *the custos*, that in THE YEAR BOOK of 2 Hen. 7. folio 1. he is called the clerk and attorney of the king. As the clerk of the crown is here *clericus et attornatus domini regis*, and, says that book, by the duty of his office, he is to prosecute for the king, as his attorney. Nay, he is so far a servant of the crown, that by the statute of 27 Eliz. c. 13. if a robbery be committed, and HUE-AND-CRY raised, and the inhabitants of the hundred do not make fresh pursuit, and so the hundred incur the penalties of former laws, there it is provided "that such inhabitants shall forfeit and lose one moiety of such penalty as shall be recovered against the hundred, to be sued for, by, and in the name of the clerk of the peace, for the time being, without naming his christian or surname, and such action not to abate for his death or removal." So that it seems to make something

thing like a corporation in that office. And therefore by the ancient constitution, I take it, that it is pretty clear the clerk of the peace had his office for life; that he was not the clerk of the *custos rotulorum*, but the clerk of the justices, or of the king, and a servant of the crown, and not dependent upon the death, or removal of the *custos*. And now, MY LORD, I come to the second thing, and that is the statute of 37 Hen. 8. c. 10. to consider how it stood there upon that statute, and the other I mentioned before, that is, 3 and 4 of Edw. 6. c. 1. The * statute of 37 Hen. 8. c. 1. recites, "that whereas
 "heretofore THE LORD CHANCELLOR, for the time being, by virtue
 "of his office, had the nomination and appointment of the *custos*
 "*rotulorum*, and the *custos rotulorum* by his office, had the nomination of the clerk of the peace;" but says that act, "of late, persons
 "unlearned and unfit for those offices, had by labour, friendship, and
 "means gotten them for terms of their lives, by patents from the
 "crown;" therefore IT IS ENACTED, "that none should be appointed
 "*custos rotulorum* for the future, without a bill signed by the king's
 "own hand, which should be a warrant to the chancellor or keeper,
 "to make him out a commission for that office, to continue only till
 "the king by another bill so signed, do appoint another person to be
 "*custos*:" thus it is as to the *custos*. Then, as to the clerk of the peace, it says, "that the *custos rotulorum* shall appoint the clerk of the
 "peace, and grant that office to an able person to hold, during
 "the time that the *custos* shall enjoy his office, so as the clerk
 "demean himself well in the office." Thus says the statute of 37 Hen. 8. c. 1.

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And now it has made an alteration in this matter, from what it anciently was in these particulars.

FIRST, That whereas THE CHANCELLOR alone, did by virtue of his office, absolutely appoint the *custos rotulorum*, now he is to give out the commission, but *sub modo*, by a warrant, by a bill signed by the king's own hand, and then he was to continue in the office till another were appointed by another bill signed with the king's own hand; so that he was removeable at the king's pleasure: and then,

SECONDLY, As to the clerk of the peace, there is likewise made a very considerable alteration; for whereas before, as I have offered, his office must be for life, he is now made dependent upon the continuance of the *custos rotulorum*, and removeable upon his death or removal; for he is to hold during the time the *custos* shall enjoy his office, which words do seem to make it clear, that he doth depend upon him; so long as the one is *custos rotulorum*, so long, and no longer, the other is clerk of the peace. But not long after this, about three or four years after, comes the statute that I mentioned of 3 and 4 Edw. 6. c. 1. And that statute takes notice, that by the statute of 37 Hen. 8. the lord chancellor or keeper could not commissionate a *custos*, but by bill signed by the king's own hand, and there being vacancies for some long time, for want of such a bill, whereby justice was hindered, and it was troublesome to the

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king* to be moved for bills upon such vacancies, and it being anciently accustomed to be done by the chancellor or keeper, therefore, that act doth enact, that the chancellor or keeper shall again nominate the *custos rotulorum*, and thereby doth restore the chancellor or keeper, as to a former right, taken away by the statute 37 Hen. 8. c. 1. But that statute laying nothing at all as to the clerk of the peace, he seems still to be remaining under the statute of 37 Hen. 8. c. 1. and therefore, my lord, I think it was taken till of late, that is, till the act of this king and queen, that the clerk of the peace did still depend upon the possession of the *custos rotulorum* of his office, and was to continue no longer, than the *custos* continued to be *custos*.

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Therefore, I now come to THE THIRD. and last thing, which I proposed to insist upon in this case, and that is, the statute 1 Will. and Mary, c. 21. and I take it, MY LORD, that this statute hath clearly restored the clerk of the peace to his ancient interest in his office, to hold it for term of his life, determinable only upon his misbehaviour in his office. Here I shall first consider the clauses of this act, that relate to the *custos rotulorum*, and then what relates to the clerk of the peace. Now, as to the *custos rotulorum*, this statute hath placed it again, as it was by the statute of 37 Hen. 8. c. 1. and consequently hath repealed the statute of 3 and 4 Edw. 6. c. 1. For it hath enacted "that the nominating and appointing of the *custos rotulorum* shall be, as is directed by 37 Hen. 8. c. 1. any law, usage or statute to the contrary, in any wise notwithstanding." But, MY LORD, as to the clerk of the peace, it will be observable how this statute provides for that; it says, "that the *custos rotulorum*, or other person to whom it doth of right belong to nominate or appoint the clerk of the peace, shall from time to time, where the office is void, nominate and appoint one able and sufficient person, residing in the country, or place for which he is clerk, to execute the same by himself, or sufficient deputy, and to take the fees and perquisites of the office for so long time only, as such clerk of the peace shall well demean himself in his said office." By virtue of this clause, I take it, that the clerk of the peace has an estate for his life in the office; first from the plain and positive words, and secondly from the intention of this act of parliament. MY LORD, the words seem as plain to me to signify so much as any words can do. For if any act of parliament be made at this day, that doth erect a new court, and doth likewise appoint that court* to make officers, who shall execute their offices "so long time only as they shall well behave themselves in their offices;" those words would give them an estate for life in their offices. If the king, or any subject, who hath the disposal or granting of any office should grant this office to J. S. to execute it "so long as he shall demean himself well in the office only," no question, but, that if the party granting had a power to grant it for life, the grantee would have an estate for life in the office; so that I take it, the words here in this act, are as full and plain as can be; and I need not repeat them again.

But, MY LORD, besides these express words which seem to me to be

be so very plain and clear, there are many things in this act, that will be found upon consideration, to enforce this to be the meaning.

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FIRST, The clause relating to the clerk of the peace, hath industriously and carefully, as on set purpose, omitted that clause in the statute of 37 Hen. 8. c. 1. which made the clerk of the peace dependent upon the *custos rotulorum*, and removeable upon his death and removal, but hath as carefully used the other words in this statute, about his removal for misdemeanor. For, whereas the statute of 37 Hen. 8. c. 1. says, "that the clerk of the peace shall hold and enjoy the office, during the time that the *custos rotulorum* shall occupy and exercise his office, so as the clerk demean himself well in the office:" this act says, "the *custos rotulorum* shall appoint and nominate one able and sufficient person to execute the office of clerk of the peace; and take the fees for so long time only, as such clerk of the peace shall well demean himself in the office," and omits totally those other words, "during the time that the *custos* shall continue *custos*." And, that omission is not by oversight, and through inadvertency, but is industriously done, because this act expressly takes notice of the statute of 37 Hen. 8. c. 1. and appoints the nomination of the *custos* to be according to that statute, and therefore the omission cannot be by chance.

A SECOND thing that I would offer to your lordship, to prove this to be the meaning of this act, is this. The statute having empowered him who has the right, to nominate one to hold it, for "so long time only as he shall well demean himself in the office," goes on, and makes provision how he may be removed for a misbehaviour. For having made him removable only for misdemeanor, it was proper next to consider, where, and how, and by whom this removal shall be made. Therefore the next clause doth direct, "that an accusation shall be put in against him in writing, and this to be done in open sessions before the justices, where it shall be examined into and proved; and being adjudged to be a misbehaviour by the major part of the justices present, they may then suspend or discharge him from the office." They may remove him in such a case, but it is not said that the *custos rotulorum* shall remove him or suspend him. And this proves, FIRST, that he is an officer of the justices of the peace, and under the controul of that court, and not of the *custos*;—and SECONDLY, that by reason of the great formality and ceremony that the act requires to be used in his suspension or removal, they did look upon him as so fixed in his office, as that he was not removeable, except only for misbehaviour in his office.

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But, there is further a third thing that is to be considered in this act, and that is this: suppose the clerk of the peace should be removed by the justices for misbehaviour, in case the *custos* doth not appoint or appoint another before the next general quarter sessions, then the justices shall nominate and appoint one. Now, I would ask this question, whether, if one be removed by the justices,

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and the *custos* neglect or refuse to nominate another before the next quarter sessions, and the justices do appoint one, whether or no, he who is so put in by the justices, shall be so dependent upon the *custos*, as to be removed upon his death, or removal? And, I take it, he shall not; and surely it never was the meaning of the act, that he who comes in by the appointment of the justices in the sessions upon the default and omission of the *custos* to nominate one, should have a greater estate in the office, than he who had the primary title by the nomination of the *custos rotulorum*.

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THE LAST THING that I would offer, and which seems to me, with submission, to be a strong argument that the parliament did intend the clerk of the peace should have a more durable estate in his office than to depend upon the continuance of the *custos* in his office, is, the great and strict provision that is made in this act, that a clerk of the peace should not buy his office. MY LORD, it was considered, and that very rightly, that if he were now established for his life, and subject as to his office to no accident but misbehaviour, or death, it might be very well worth his while to bid money for it, and people would be eager to * chaffer for it, whereas before the uncertainty of the estate depending not only upon his own life, but the life, surrender, or removal of the *custos*, it would be very hazardous to give money for such an uncertain interest. But now, if he were in certainly for life upon his good behaviour in the office, it might prove a good bargain, and upon this account doth the act strictly provide against any thing of that nature; it first makes it illegal to buy or sell under the penalty of forfeiting on both sides the double of what is given or taken, and of disability to hold their places; nay not only so, but it orders, "that the clerk of the peace before he enters upon his office, shall in open sessions take an oath, that he hath not, nor will pay any money or reward, nor give any bond or assurance to pay money, fee or profit, directly or indirectly to any person or persons whatsoever for such nomination or appointment." Now, MY LORD, what was the meaning of all this caution and care; first about the removing the person, but that he was in for life, and therefore more heed was to be taken that such an interest should not lightly be divested. And secondly, what means the great care that he should be let in by clean hands, but that now the estate for life was a valuable interest to purchase and give money for.

MY LORD, these are the things that I do humbly offer to your lordship's consideration.—FIRST, That by the ancient constitution he was an officer for life.—SECONDLY, That by the statute of 37 Hen. 8. he was made dependent upon the continuance of the *custos* in his office.—But THIRDLY, upon the last act, he is restored to his ancient estate for life, both by the plain words, and also by the meaning of the act to be collected from the several parts of it that have been mentioned. So that I take it, he is now in for life, and the consequence of that will be, that the fees received by the defendant belong to the office, and are received to his use who hath right

right to the office; and so the plaintiff ought to recover; and therefore I humbly pray your lordship's judgment for him.

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Mr. HAWLES. May it please your lordships to favour me with a word for the defendant *Mr. Fox*. The special verdict has been already truly opened by SIR THOMAS POWIS, and therefore I shall not go about to repeat it, but I will follow the method in considering this case which he has done before me. AND * FIRST, with submission, whatsoever the common law was as to offices that were so ancient, is no rule in this matter; though it is we know, that as our books tell us, some offices were for life. And the office of chancellor of England, my LORD COKE says, could not be granted to any one for life. And why? because it never was so granted, Custom and nothing else prevails and governs in all those cases; of those offices that were usually granted for life, a grant of such an office for life was good, and of those that were not usually granted for life, a grant of such an office for life was void. But as to this office now in dispute, there can be no pretence of its being a common law office, for the common law knew no such thing as a clerk of the peace, nor justices of the peace, to whom they say he is a clerk; we know, that the statute of 3 & 4 *Edw. 3. c. 1.* that makes justices of the peace, makes no mention of any such clerk or officer as *clerk of the peace*, but it was an incident; perhaps some body was necessary to officiate in that kind; for the justices would not make and write their own records themselves, and therefore must have some officer to do it for them; and that statute that was mentioned on the other side of 12 *Rich. 2. c. 10.* shews plainly that there was no such officer then known by that name as *clerk of the peace*, for he is called there *the justice's clerk*, so that in all probability he was one that was appointed by them to do that work for them. Nay, MY LORD, as to any thing that we know, it is very probable, and I believe it was so, at that time, he that was their clerk was *custos rotulorum*, and intrusted with the keeping of the records, and afterwards it coming to be an honorary thing to be the *custos rotulorum*, he that was the most eminent for quality among them, was appointed to that trust, and then he appointed the clerk as his deputy, or servant under him. MY LORD, there is no statute or law that I can find, that ever gave any power to the chancellor to make a *custos rotulorum*, but the chancellor making out the commission for constituting the justices of the peace, might very well put upon them one to be the keeper of the records, and to have the first place or degree among them; and then, that *custos* might very well put one upon the sessions as his servant or deputy, for the management and custody of the records; who, being clerk at the sessions, came in time to be clerk of the peace. This looks to be the most probable account that can be given of this matter, for a certain one cannot be given; we have no history of it in our law-books, or elsewhere. But * the statute of 37 *Hen. 8. c. 1.* recites, "that the chancellor had very much perverted the institution, and altered the intended course, by taking upon him to make grants of

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9 Co. 97.
Cro. Eliz. 636.
2 Roll Abr.
182.
Cro. Car. 513.
2 Co. 16.

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"the office of *custos rotulorum* for life;" and so likewise the clerks of the peace were for life too. It was not only that ignorant and insufficient persons were put into the office, for then the common law itself will turn out of any office if they be not able to perform it; that was not the main reason of making the act; but the grants for life was the great grievance; and therefore it does enact for a remedy of that mischief, "that the *custos rotulorum* shall be appointed by bill signed with the king's own hand, and at his pleasure removeable and alterable, and the clerk of the peace is to be appointed by the *custos*, and to continue only during the time of the other's continuing to be *custos*." By this act the *custos*, by way of remedy to the former inconvenience, has a power to grant the clerkship of the peace for so long as he is *custos*, and he is to receive the fees so as he behave himself well in the office; and though there be no negative words that he shall continue clerk of the peace no longer, yet with submission, these affirmative words amount to a negative. For when the act recites that the grants that were made for life were mischievous, and the law was to make provision of a remedy to that grievance: and in order so it says, "the *custos* shall be removeable at the king's pleasure, and the clerk of the peace should be appointed by the *custos* to continue during his time of being *custos*, so as he behave himself well in the office;" that, with submission imports, that the clerkship of the peace should never be granted for a longer interest than the *custos* had in his office. The statute of 3 & 4 *Edw.* 6. c. 1. does indeed repeal part of this statute of 37 *Hen.* 8. c. 1. not by express words of repeal, but by a very strong implication, by giving the chancellor or keeper the power of nominating and appointing the *custos rotulorum*, but the office of the clerk of the peace is not touched in this statute of 3 & 4 *Edw.* 6. c. 1. but continued as it was settled before by 37 *Hen.* 8. c. 1, which was only during the time of such *custos* continuing in his office. It is then, my lord, this new statute of the first of this king and queen, that, if any be, comes and makes the variation as to this matter, at least that ministers the occasion of dispute; and truly, with submission, if the case stand barely upon that point, as it should seem it does, I think, that there is nothing in this act that makes any such alteration of the law as they now contend for. It is true, the words seem to have something of a change in them at the first reading; but if your lordship please to look a little nearer and more narrowly into them, there is no change at all; the words, "so long only as he shall well demean himself in the office," are not enlarging of his estate, but restrictive only. And, with submission, when ever you will make a grant for life to be good, you must consider the power and capacity of the grantor, and how the thing granted is capable of having a grant made of it. If tenant in tail make a lease for life of his intailed lands, that is only a lease for the life of tenant in tail, and not for the life of the lessee, because he could not grant any further interest; but if tenant in fee grant an estate for life, that will be a good lease for the life of the lessee, because he was capable of making such a grant, which the other was not. And, as I said, it must be considered further, whether

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whether the office or thing granted be capable of having a grant made of it for life; and, with submission when there is an express statute before, that faith, "it shall be but during the continuance of the grantor in his office of *custos*," then every grant is to be construed according to that provision, and is good, if it pursue that provision, but otherwise it is not good. I know very well, that it is said a grant *quam diu se bene gesserit* is a grant for the life of the grantee: but, my lord, if you look into those words more narrowly, they do not import any such thing at all, it is indeed a restrictive condition that the law puts upon all officers; for misdemeanour in any office, though granted in fee, is a forfeiture of the office. But all that is to be considered is, if it be an office that is capable of being granted for life, those words may amount to a grant for life, as expounded by the usage and capacity of the office itself, otherwise it will not. For those words seem only to be an expression of what the law always implies, though not particularly expressed. If it operate any thing, it seems only to have reference to the power of the grantor, as a restriction, not an enlargement of the estate of the grantee, especially where there is by law an incapacity upon the very office of being granted for life. Therefore, that which I most principally rely and must insist upon, is the statute of 37 Hen. 8. c. 1. which is not repealed, as to this matter by 3 & 4 Edw. 6. c. 1. nor by 1 Will. & Mary, c. 5. and this statute expressly says, "that the clerk of the peace is to continue in his office only during the time that the *custos* who put him in, continues to be *custos*." The statute of 3 & 4 Edw. 6. did * not alter this matter, and where it did make any alteration, itself is expressly repealed by this last act of this king and queen, which revives 37 Hen. 8. c. 1. as to what alteration was made by 3 & 4 Edw. 6. c. 1. about the nomination of *custos*: and appoints that the order appointed by 37 Hen. 8. c. 1. be constantly observed; and as to the clerk of the peace, I take it, this last act is no way a repeal of 37 Hen. 8. c. 1. MY LORD, I hold it as a settled rule, that if there be two statutes that are consistent with one another, and not repugnant and contradictory, the latter statute shall not be expounded to be a repeal of the former. I do indeed clearly conceive, that the act of the first of this king and queen, did repeal that of 3 & 4 Edw. 6. c. 1. but is consistent with, and consequently did not repeal the statute of 37 Hen. 8. c. 1. When the matter of two statutes is directly contradictory the one to the other, I do agree, this last must be observed, and doth repeal the first; but where they do not contradict one another, but may consist and stand together, the latter is no repeal of the former, as the rule is given in *Dr. Foster's case*; in 11 Co. 5. 6. The statute of 23 Eliz. c. 1. that gives the twenty pounds a month for recusancy, it is resolved did not repeal the statute of 1 Eliz. c. 2. for the twelve pence a Sunday, because they are both consistent and stand together; and do not directly contradict one another. It were to no purpose to cite any more cases to this point, or to multiply authorities: it is an agreed settled point, that where acts of parliament are consistent, the latter does not repeal the prior. They are to be taken as wills are. If there be two

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wills that are inconsistent with each other, the latter will shall be a revocation of the former; but if they can stand together, it shall be no revocation, as is the case of *Hodgkinson v. Wood, Cro. Car. 23*. MY LORD, it will be same thing as to acts of parliament, *leges posteriores priores contrarias abrogant*; but if they are not contrary, but consistent, then they do not abrogate the former. Let us then look upon these statutes, and see whether they are not consistent. The one says, "the clerk shall continue in his office, during the time that the *custos* continues in his office, so as he demean himself well;" the other says, "he shall enjoy the office so long only as he demeans himself well in it." Now, if you take the office to be grantable, but only during the time that the *custos* continues to be *custos*, as the statute of 37 Hen. 8. c. 1. says, and after there should come these words that are in this latter statute, they are plainly consistent together, and not contradictory at all. Nay, * the express grant to Mr. Fox, from the earl of Bedford, is pursuant to the words of the statute of 37 Hen. 8. c. 1. which restrains it as well as the last statute, to well demeaning himself in the office. His grant is "to hold the office during such time as the earl continued to be *custos*, so as he demeaned himself well in the office." But Mr. Harcourt's grant is without any relation to the provision of the statute of 37 Hen. 8. c. 1. which is intended by this last act to be revived; and all the meaning of it, as to the clerk of the peace, is to give the justices a rule and method how to displace him for misdemeanour. All which things are consistent with the order appointed for this office, by the statute of 37 Hen. 8. c. 1. and not contradictory to it; and being so they cannot be expounded to be a repeal of that statute; and therefore the office became void upon the removal of my lord of Clare; and the present *custos* was entitled to make a new grant of it for his time, which he has done accordingly to the defendant. And I hope your lordship will please to give your judgment for him,

* Michaelmas Term,

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The Fifth of William and Mary,

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THE KING'S BENCH.

Saturday, the 4th November, 1693.

The King and Queen against the Bishop of London, William Lancaster, and others. Case 262.

Hilary Term, 3 William and Mary, Roll 695.

MR. COOPER. May it please your lordship, I am of council in this case, for their majesties, who bring a *quare impedit* against Henry bishop of London, and William Lancaster divinity professor, for recovery of the presentation (*hac vice*) to the vicarage of Saint Martin's in the Fields. The declaration sets forth, That Humphrey late bishop of London was seised of the advowson of the said vicarage in gross, as of fee, in right of his said bishoprick; and that being so seised (the said vicarage being within the diocese of London) he collated the said vicarage then vacant, unto Thomas Lamplugh, who by virtue of such collation, was put into the corporal possession of the said vicarage. And the said Thomas Lamplugh being thus vicar, was afterwards created and constituted bishop of Exeter; by virtue of which promotion the same vicarage became vacant, and belonged to the late and then king CHARLES THE SE-

The bishop of London, having the patronage of the church of St. Martin in gross, collates Dr. Lamplugh to the living; Dr. Lamplugh is created bishop of Exeter; and THE KING, by his prerogative, presents Dr. Lloyd to the vacancy. Dr. Lloyd is made bishop of St.

Asaph, and THE KING presents Dr. Tennison, who is created bishop of Lincoln, with a dispensation to hold the vicarage of St. Martin, and the rectory of St. James, until such a day. AND AGREED, 1st. That the king has a prerogative to present to the church of a subject on the incumbent's being created a bishop. 2^d. That upon all avoidances by cession, this prerogative *toties quoties*, takes place; and 3^d. That a dispensation to hold the same church does not satisfy this prerogative.—S. C. 3 Lev. 377. S. C. Lev. Ent. 344. S. C. 4 Mod. 200. S. C. 1 Jones 404. S. C. Comb. 205. 300. S. C. Carth. 313. S. C. 2 Salk. 540. 559. S. C. Holt 585. S. C. Ld. Ray. 23.

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COND to present, by reason of his prerogative, who, accordingly presented *William Lloyd*, divinity professor, who was admitted, instituted, and inducted; and * then the said *William Lloyd* being thus vicar of the said vicarage, was afterwards created and consecrated *bishop of St. Asaph*; upon which promotion the church again became vacant; and the said king CHARLES THE SECOND, by reason of his prerogative, again presented *Thomas Tennison*, doctor of divinity, who was admitted, instituted, and inducted; and the said *Thomas Tennison* being vicar as aforesaid, was created and consecrated *bishop of Lincoln*, by which promotion the church was again vacant, by reason whereof it belongs to the now king and queen to present, *ratione prerogativæ suæ regię*; but that they are hindered by the defendants. MY LORD, there is upon the record (which I shall skip) an entry of a demurrer, upon a plea in abatement, which plea was over-ruled, and a *respondeant ouster* adjudged against the defendants. Upon that the defendant, the *bishop of London*, comes in and demurs to the declaration generally. The incumbent, the other defendant, *Dr. Lancaster*, pleads in bar that he is vicar of the said vicarage, by the collation of the other defendant, the *bishop of London*. And then he confesses the seisin of *Humphrey* late bishop of *London*, as it is alleged in the declaration, and the collation, to *Thomas Lamplugh*; and the promotion of *Dr. Lamplugh* to the bishoprick of *Exeter*; and the king's presentation of *Dr. Lloyd*, and his institution and induction; and the promotion of *Dr. Lloyd* to the bishoprick of *St. Asaph*; and the king's presentation of *Dr. Tennison*, *ratione prerogativæ*, and his institution and induction. Then he sets forth the statute of 25 Hen. 8. c. 20. made against suing for licenses and dispensations from the see of *Rome*; and for conferring the power of granting such dispensations on the archbishop of *Canterbury*, for the time being, under the confirmation of the king by his BROAD SEAL, in some special cases. Then he sets forth, that after the making of that act, and before the teste of the original writ, the other defendant *Henry*, was made *bishop of London*; and that afterwards, and before the teste of the original writ (to wit) the 20th of *December* 1691, the said *Dr. Tennison* was elected *bishop of Lincoln*. Then he sets forth, that the archbishop of *Canterbury* the 22d of *December*, 1691, did by his letters of dispensation, according to the form of the said statute (reciting as is usual, the king's pleasure signified to him) dispense with the said *Thomas Tennison*, * and granted that he should have power and authority to retain together with his said bishoprick of *Lincoln*, the said vicarage of *St. Martin's*, and rectory of *St. James's Westminster*, which the said bishop elect was then possessed of, till the first of *July* then next following, and hold the same in COMMENDAM in tam amplis modo et forma quibus ante tunc usque tempus consecrationis literar' dispensationis predict' diebus EPISCOPUS LINCOLN electus retinebat et possidebat and might take and dispose of the profits of the said livings, *etiamsi in dictis vicaria et rectoria non resideret*, &c. Then he sets forth in his plea, that the king and queen by their letters patents under THE GREAT SEAL, dated 23d of *December*, in the third year of their reign, and enrolled in chancery, according to the form of the said statute, confirmed

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firmed the said letters of dispensation; and then avers that the said dispensation and confirmation are not repugnant to the law of God; and that dispensations in like cases were usually granted before the said act from the see of *Rome*. Then he sets forth, that afterwards, to wit, the 25th of *December*, 1691, *Dr. Tennison* was created and consecrated *bishop of Lincoln*; and that *vigore præmissorum* the said *bishop of Lincoln* took to his own use the profits of the said vicarage till the first of *July*, *ad quem quidem diem vicaria illa secundum limitationem in prædictis litteris dispensationis mentionat' vigore præmissorum vacavit*, whereupon the said *bishop of London* put the defendant *Dr. Lancaster* into possession of the said vicarage by collation; and then concludes with another averment or two, for greater certainty of pleading. The *Attorney General* joins with the *bishop of London* in his demurrer; and as to this plea of *Dr. Lancaster* he demurs, and the doctor joins in demurrer,

MY LORD, there is (for I would take both cases together) another record of the like *quare impedit*, brought by the king and queen against the *bishop of London*, and *Dr. Birch*, for the presentation to the rectory of *St. James's Westminster*, which I shall not now stand to open particularly, because I take it to be the same in substance with the other. There are some material variations, as indeed there is a particular act of parliament set forth in *Dr. Birch's* plea, made in the first year of *James the Second*, for erecting that parish, which I shall take notice of in the end of my argument: not that of myself I should have thought it necessary to do so; but because when I moved to make these records *confiliums*, I received an admonition from the counsel on the other side, at the bar, that I should find a difference when * I came to argue them, and except * [444] they mean that that act of parliament makes the difference, I know of none. And I must yet confess, I know no essential difference at all. And if they mean a difference that is not so, I am glad to find they begin to please and comfort themselves with this expectation, that when they have lost all hold of the former cause, there yet be that straw left to catch at in the latter.

MY LORD, I think the *points in law*, arising from these records, are generally but two; THE ONE arising from the bishop's demurring to our declaration; THE OTHER from the attorney general's demurrer to the pleas of the incumbents. The declarations entitle their majesties to the presentations (*hac vice*) upon the last incumbent's being made a bishop *ratione prerogativæ suæ regiae*. The *bishop of London* has demurred to this title of the kings, by which he has forced me for method sake, to make that a point, which otherwise I had taken for undoubted and settled law, to wit, FIRST, that whenever there is an avoidance of a living by cession, or by the incumbent's being made a bishop, the king by reason of his prerogative, is to present for that turn, and not the patron,

And, MY LORD, as to the other point, I conceive that the title of the king is not hurt by the dispensation, or confirmation thereof pleaded by the incumbents, or any other matter appearing upon these records,

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As to *the first point*, I am sensible it is a prejudice to a clear right, founded upon plain and settled law, to enter into any reasoning concerning it, or to produce arguments to prove the fitness and justice of that law. For that is to draw the matter again into question, and then that may not appear reason to one man, which has seemed so to another. Whereas I take it, the authority of a constant usage for a whole century of years and upwards, backed and strengthened with judicial resolutions and allowances from time to time thereupon had, is a sort of sensible argument which is sure of success, and being in the nature of a positive law, can command a submission where it is not able to persuade an assent in reason. Therefore, MY LORD, I shall only produce some of the principal authorities, which are to be found for this prerogative, and rely upon them, without entering into the reasonableness of this law, only so far as shall be found incidentally necessary to the confining; and avoiding some ancient authorities which seem to be against us in this point. FIRST, * there is the case of *Eeds v. the Bishop of Oxford*, *Vaugh.* 18. In the beginning of that lord chief justice's argument in that case, it is one of the points which he takes for granted, and lays as a foundation for his opinion; that *the king*, and not *the patron*, is to present to benefices so void by cession; which shews that this point was then taken for a settled point in law by the counsel on both sides, and by the judges on the bench, or else he would not have put it among the principles which he was about to argue from, without farther proving it; and this I take to be one of the strongest sorts of authorities that can be cited. So in the case of *Basset v. Gee*, *Cro. Eliz.* 790. That is an authority much of the same nature; it is not indeed judicially the point in question there, but it is preliminary to that which is there the point in judgment; and it seems there to be admitted on all hands as settled law. The second part of *Rolls Abr.* 343. after enumerating some old books wherein the contrary doctrine seems hinted at, concludes with this caution, "but the law is now otherwise generally taken; and agreed, that is, that the king shall have the presentation."

In the case of *Armiger v. Holland*, *Cro. Eliz.* 542. this prerogative happens to be mentioned accidentally to the point in question; and COKE then *attorney general* says, "I can shew the resolution of all the justices, that the queen in such cases shall present:" and POPHAM then *chief justice* says, "so is the common experience to this day." This case was Hilary Term, 39 *Eliz.* In *Wright's case*, reported in *Moore* 399. there this was the very point in question, and if that report be true, the judges there called it the "ancient law," and "prerogative of the crown;" and at last it was adjudged upon many precedents shewn, and many books cited and perused, that where a church becomes void by cession, the king, and not the patron, shall present. The next I shall mention, is *Woodley's case*, *Cro. Jac.* 695. There this prerogative is adjudged for the king, and that in one of the hardest cases that can be put, which I shall have occasion to mention more particularly hereafter, *Bro. Abr. tit. "Presentment at Esglise"* pl. 61. cites a presentation by

by king Edward the Third, *pro hac vice ratione prerogative sue* upon the incumbent's being made a bishop; and the book concludes with a remark, that the law is so.

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* The same book, and the same title, *pl. 14.* in the abridgment of part of the great case of 11 Hen. 4. *pl. 37.* It is now said in such case of creation, the king shall present to all benefices *de cujuscunque patronatu existunt.* And the same book, and the same title, *pl. 3.* abridges a case, 41 Edw. 3. *pl. 5.* where a clerk is made a bishop by his consecration, all his other benefices are void, and the king shall present *de quibuscunque patronatibus existunt.* MY LORD, I have not prepared myself to trouble you with producing more authorities of this kind, though I question not, more might be found in the books; nor do I think the constant usage and practice has been for the king to have the prerogative; the crown has been in possession of it for so many years past for a time sufficient to procure any private person in the quiet enjoyment of his estate and property. MY LORD, it is true, there are some old books in the times of Edward the Third and Henry the Fourth, which in the time of queen Elizabeth, and thereabouts, did induce now and then a single judge to hesitate and question the legality; or at least the antiquity of this prerogative. But I could observe this upon all these cases, which are generally of the same nature, they are *quare impeditis* brought by the king to recover the presentation upon an avoidance by cession, where he makes his title either by the statute of provisors, or as guardian of the temporalities during the vacancy of the see; and the king does not mention in making his title this prerogative, from whence some would infer that he had it not. MY LORD, at present I think I have no need to go about to look into the probability of this argument. But I cannot admit the inference to be good. The king has two titles to present, one as in right of the temporalities, in his hands; the other by cession *ratione prerogative*; upon a *quare impeditis* brought, he is, I think, regularly by law to hold himself to one of them; but then because he does so, I take it to be no argument to prove, and therefore he hath not the other in him. However, I do not dispute. But admit the old books till the time of Henry the Eighth are not very clear in this matter; and I find that that case which I cited of *Woodley*, in *Cro. Jac.* 696. says, that many precedents were shewn and produced to prove the lawfulness of this prerogative since the time of Henry the Eighth, and it must be confessed, that the law books speak of it since that time with greater clearness than they did before; putting all which together, I conceive it may very well be accounted for, and reconciled in this manner. One great reason among many which I find given for this prerogative in the case of *Wentworth v. Wright*, *Cro. Eliz.* 527. and wherever it hath been reasoned upon, is, that the vacancy proceeds from the king's own act; it is sufficient for the patron, that he shall have the advantage to present upon avoidance by the act of God, as death, or by the act of the incumbent, as resignation, and the like; but the avoidance upon the promotion of the incumbent to a bishoprick proceeding from the king's own act, it is fit he should have the benefit of it;

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for if the king had not done it, the vacancy might have been suspended till the death of the incumbent. Now, MY LORD, this reason was not in force from the time of king *John*, till the twenty-fifth year of *Henry* the Eighth. What it was before the time of king *John*, we are perfectly in the dark about it, having no reports of law cases so old, but during that interval between his time, and the twenty-fifth year of *Henry* the Eighth, the king had little or nothing to do with the elections or consecrations of bishops; the elections of the chapters were then, or by law, ought to have been free after the king's general license to proceed to election first had, as appears by the statute of provisors, 25 *Edw.* 3. c. and the 13 *Rich.* 2. c. 2. And the consecration or investiture was under the authority of the see of *Rome*, and such election and such consecration made the incumbent perfect bishop, especially as to the avoidance of his former livings; indeed, it is true, they afterwards did come and pay a formal complement to the king in asking his assent, and renouncing every thing done by the court of *Rome* in derogation of his royal authority, which was in order to get the temporalities out of the king's hands. But still the bishop was perfect bishop, and all his former benefices voided by the free election of the chapter, and the consecration by virtue of the pope's bulls. So that during that time the avoidance could hardly be said to happen by the king's act. But now since the statute of 25 *Hen.* 8. c. 20. the tables are turned, the king has all the essential power necessary for making a bishop, and the clergy have nothing left them but a mere shadow of power, a negative voice indeed, a very snare to them, which it is as dangerous as vain and idle to make use of. So that, as the reason of this prerogative grew stronger and stronger, I observe the judges grew clearer and clearer in their opinions for it; and have given it from time to time judicial allowances, I think, without interruption; till at length they have added to the rest, one argument more for it, and that the strongest of all, the authority of a long and constant usage for so many years past, to this day, and which it seems, has intitled the crown to so many several presentations to this very church of *St. Martin* upon the same title that is now contended for. So that, MY LORD, I shall venture to trust this first point upon what has been said, and pass to the second the more considerable of the two. That this title of their majesties to present *pro hac vice* upon the promotion of the incumbent to a bishoprick, is not altered or hurt by the dispensation in the *retinere*, or any other matter appearing upon these records.

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MY LORD, having proved already, that there is such a prerogative of the crown, that upon all avoidances by cession, the king, and not the patron, is to present. The next step I am to take, is to shew, that these avoidances in these livings of *St. Martin* and *St. James*, did happen by cession, or by the promotion of *Dr. Tennison* to the see of *Lincoln*, notwithstanding any matters set forth in the pleas of the incumbents, and that I hope may be done in a very plain method.

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FIRST, MY LORD, the election in this case comes in point of time before the dispensation, but the consecration is after the dispensation. Now it is most clear law by many authorities ancient and modern, that it is the consecration, and not the election, which makes the bishop; and consequently that the benefices of the bishop are not voided by the election, nor until consecration; so is 41 *Edw. 3. pl. 5. B.* and the great case of 11 *Hen. 4. pl. 37.* and the case of *Eed v. the Bishop of Oxford, Vaugh. 19.* and indeed all the books which speak of an avoidance by cession, agree this to be law. Next, MY LORD, I take to be as clear, that this dispensation and confirmation pleaded by the incumbent's coming before the avoidance by consecration, did prevent and suspend the avoidance; so that it did not happen at the time of the consecration, nor until the first of July, when the force of the dispensation expired. And this matter is the better opinion of the great case already cited, 11 *Hen. 4. pl. 37.* and largely treated of in the other case of *Eed v. the Bishop of Oxford*; and sufficiently proved there by the LORD CHIEF JUSTICE VAUGHAN, whose labours I might use if there was any occasion for it upon these records: but I think, MY LORD, the defendants in their pleas, have in a great measure saved us that trouble, for they have averred that such dispensations are not contrary to the law of God; that the popes used to grant such dispensations before 25 *Hen. 8.* and indeed all the other things by which the LORD CHIEF JUSTICE VAUGHAN in *Eed's case*, proves, that the archbishop and the king may legally grant * such a dispensation by that act; which was necessary for them to do, for if the dispensation was not good, it would make nothing for them upon the points that they go upon. If then the dispensation be admitted legal and valid (as I say it must be, or the defendant's have nothing in their case) it is to be considered next, what is the effect of it, and that is best seen from the dispensation itself. It is a dispensation giving a faculty *retinere*, not *capere*, and to retain in the same state that the incumbent had it before. MY LORD, it appears in *Eed's case, Vaugh. 24.* besides many authorities there cited, to the same purpose (and I never saw any book that doubted but that) by virtue of such a dispensation in the *retinere*, the incumbent after his consecration continued in his benefit *per vim prioris tituli* to all intents and purposes whatsoever, during the dispensation. But I shall not trouble your lordship with a long bead roll of authorities upon this head; for the defendants have agreed this too in their plea; they allow the dispensation *retinere in tam amplis modo et forma* to be effectual: they plead the consecration, but do not say the livings immediately avoided upon the consecration; but on the contrary they say, that *Dr. Tennison* did enjoy the livings, and continued to take the profits until the first of July then next following, at which time the said churches, according to the limitation in the dispensation became void. So that we seem agreed thus far, that the churches then first became void; and the only question (if it be a question) is how the churches did then become void? and truly, as to that question, let them but give me a single and determinate answer, and I dare refer myself to the counsel on the other side, to tell how. Can it be by any other means

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means than by cession, by the promotion of the incumbent to be a bishop? This is so clear a truth, that they who drew the defendants plea, found it stared them in the face; and they could not avoid taking notice of it, nor cover it, but under a general and ambiguous expression; for they say it became void that first of *July, vigore præmissorum*. But now, with submission, I could ask which of the premises it is that made the livings become vacant? it was not the election of *Dr. Tennison* to be bishop of *Lincoln*; that is proved already and agreed to be no avoidance in law. It was not nor could be the dispensation or confirmation, for they were made to prevent the avoidance, and did actually suspend it while they had a being, and for want of which it had been vacant; so that there remains nothing but the consecration that could cause the * avoidance, and the *vigore præmissorum* must signify that at the first of *July*, when the dispensation expired, the livings became void, by virtue of the consecration. *VAUGHAN Chief Justice*, in the end of *Eed's case*, speaking of a dispensation in the *retinere*, says thus, "that when it comes to be determined, the matter is as if it had not been;" but if this dispensation had not been, no doubt the livings had been avoided by cession. *MY LORD HOBART* in his Reports, 143. in the case of *Colt v. Glover* (whereas they call it *commendam*) says, "a *commendam retinere*, is properly no *commendam*, but only a *faculty* of retention, "and a continuation of the benefice in the same person and state "wherein it was, notwithstanding something intervening, as a bishoprick or the like, which without such a faculty would have avoided it;" so there this faculty keeps the benefice in the same person and state it was till the first of *July*, when for want of it the living became void by cession. And, *MY LORD*, it being thus proved, and taken for granted, that the king is to present upon an avoidance by cession, and that these benefices did void by cession only, the conclusion is self-evident, and therefore I need not mention it; and I can see but one way of evading the force, that hath any colour. They may say, it is true, the general practice has so gone, and so the law is generally taken, and in strictness of law, if you follow it close, it is an avoidance by cession; but all general rules have their exceptions; and this general rule has this exception, where it happens after a *commendam*. And in this case the churches continuing full after the consecration, by virtue of a dispensation which the king confirmed, the king has thereby supplied his turn; and so this may be excepted out of the general rule of this king's prerogative, to present upon an avoidance by cession. But for this, I give it this answer: *FIRST*, I say it will lie upon them on the other side, to produce authorities to prove this case of their's to come within any such exception of the general rule, which otherwise lies hard upon them. But truly, in the mean time, I think it may be proved in the negative, that the law admits of no such exception, and that this act of the king's, set forth in the incumbent's plea, cannot in law or reason amount to a fulfilling of the king's title by prerogative, or an user or satisher of the turn which the law gives him, and that upon these authorities and considerations. These * two great chief

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justices HOBART and VAUGHAN were of opinion, that there were no such exception.

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And LORD VAUGHAN in *Eed's case* 25. puts a much stronger case than this present case, that is, of such a dispensation in the *retinere*, to last for three years; if, says he, "I obtain a dispensation, before consecration, to hold my benefice for three years, during the force of that dispensation I remain parson of the same benefice of no less estate than I had before; and, when the three years are past, the benefice voids as it would have done at the first, if there had been no dispensation." The LORD HOBART, before him, in the case of *Colt v. Glover* 156. says the same thing in almost the same words, but with this addition, that "here is no injury done, either to church or patron; for though it be *damnum*, yet it is *absque injuria*." And so they make no difference between this avoidance by cession, and after a dispensation; for they say in the case of a suspension, by dispensation in the *retinere*, for three years, it does avoid at the end of the three years, as it would have done at first, if there had not been a dispensation. But then, MY LORD, to enter into the consideration of the reason of the thing, as there is no law to justify this difference, so neither can there be any reason assigned, why this dispensation in the *retinere* thus confirmed by the king, should amount to an user and fulfilling of the king's turn: and that upon these grounds; FIRST, this dispensation or grant of this faculty to retain, is the act of the archbishop, and not of the king, who only confirms. My meaning in this is to be found in my LORD VAUGHAN (who observes very well in *Eed's case*, folio 26.) where speaking of this same act of confirmation, he says, "the king by such confirmation, does not intend to transfer any right of his into the incumbent, by continuing his possession; but his confirmation is only formal, to compleat the dispensation of the archbishop." Again, this I reckon is but a day or two longer than a *commenda semestris*, and *de minimis non curat lex*. Now if the archbishop had in this case, subsequent to the consecration, granted a dispensation or faculty, which they call a *commenda semestris*, to Dr. Tennison, then bishop of Lincoln, *capere et tenere*, these livings in *commenda*, for half a year from the time of the avoidance, this is (though it be in the *capere*) but a temporary provision for the church, for such time as the law gives the patron to present in; and though the king had confirmed such a dispensation, that might have been without hurting his right of presentation; and * I hold, that at the end of that *commenda semestris*, the king, and not the patron, should present. For it is plain in *Hob.* 144. in the case of *Colt v. Glover* where all this doctrine is treated of and from the many learned and laborious citations by him there made out of the canon law, that this *commenda semestris* had nothing of a presentation in its nature, nor meddled with the presentation, or right of patronage; but was merely a temporary care or provision for the church during the time which the patron had by law to present in, and grew out of a natural equity, that the cure of souls might be always served, and therefore it might legally be made without content of the patron; and it expired at the time limited, which a *commendam*

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in the *capere* for a longer time after the avoidance could not, for that amounted to a presentation in its nature, and could not be for a less time than a perpetuity; and the commendatory was regularly to have been presented by a patron, and sometimes instituted and inducted. My LORD, the use I make of this matter is this; if the king might, as I make no doubt he might, have confirmed such a *commenda semestris* without infringing his right of presentation, much more might he do so in a dispensation *retinere*, which prevents the avoidance for so long as it continues in force; it being made in time before his right happened. It is proved, and indeed admitted, I see, that the church first avoided the first of July; and since that, there is nothing pretended to be done to the prejudice of the king's title, or towards the supply of his turn; and it is very hard to pretend to have him do any act before he had a title in him that should hurt his subsequent title, or be an user or executor of it. Besides, MY LORD, how can it be said, that this dispensation and confirmation amount to an user or an execution of the king's turn, which he has by cession? for it is inconsistent in itself to say, that one and the same act shall be construed a suspension of the vacancy, whereby the title should arise, and yet at the same time be a using of the turn, and a supplying of that vacancy which was so suspended, from happening. The dispensation and confirmation kept off the king's title from accruing till the first of July, and could they likewise give him the full benefit of that title in the mean time? that is repugnant and impossible. But, * MY LORD, there is another consideration which extends itself only to the church of *St. James*, where *the bishop of London* has only the next avoidance, and the *Lord Fermyn* the next after that; now if the king has had his turn by this dispensation and confirmation, then *the bishop of London* has lost his next presentation, and so *the bishop* has made no title; for then the *Lord Fermyn* is to present next, and not *the bishop*; according to *Woodley's case*, *Cro. Jac.* 695. where it is adjudged, that if the grantee of the next avoidance has it evicted from him by this prerogative of the king, it is lost for ever, and he shall not have the next to that, for here the king presents in the grantee's turn; but if the king has not used it, then it is not lost. And they there put the case of an eviction by title of dower subsequent to the grant of the next avoidance, or by statute: but my LORD COKE in his Commentary upon LITTLETON, *folio* 378, *b.* and 379, *a.* denies that of dower to be law in this special case, where the grantor, seised of an advowson in fee, takes a wife by which she becomes intitled to the third presentation, and then grants the third presentation to another, and the husband dies, it shall be taken the third presentation which he may lawfully grant, that is indeed the fourth. But it should seem otherwise, if the grant had been made before marriage, for there the grantee loses his turn for ever by such eviction: and so is *Cro. Eliz.* 790. in the case of *William v. the Bishop of Lincoln*. MY LORD, it has been already observed, and further may be seen in *Jones* 161. *Evans v. Aswith*, *Fitzb. N. B.* 36. *b.* *Lit. H.* there the law is made very plain from cases put, that by virtue of this dispensation in the *retinere*, the incumbent continues in *per vim prioris*

prioris tituli; and if *Dr. Tennison* continued in till the first of *July per vim prioris tituli*, then it seems the king's confirmation could not transfer any new title to him, and so the king by this act of confirmation did not impair or diminish his own title.

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I have now, MY LORD, gone through the two main points which I mentioned at first to concern both the cases; and now come to take notice of the difference and distinction between the two cases, that was hinted at by the other side, as far as I can apprehend it: and it stands thus. In the declaration upon the second *quare impedit* brought for the presentation to the church of *St. James, Westminster*, is set forth the act of parliament made in the first year of *James the Second*, for erecting that a parish. It enacts, "that there shall be a perpetual succession of rectors there to have cure of souls, &c." Then it comes to appoint the right of patronage, and order of presentation: * *Dr. Tennison*, for his great services, particularly to that place, is appointed the first rector: afterwards, upon his death, or the next avoidance, the advowson or presentation shall belong to the bishop of London and his successors, and the Lord *Fermyn* and his heirs: there it is given promiscuously; but then it settles it in this order, that the bishop of London should present or collate first; then the Lord *Fermyn*, or his heirs; then the bishop of London twice; then the Lord *Fermyn* once; and so twice and once for all time coming. This, by the act, is the distribution made of the presentation, and the advowson being given to the bishop of London and the Lord *Fermyn* in fee, their several turns are appointed to them. And now, what use would they make of this act? what would they have this matter amount to? truly I have all the reason in the world to ask [their pardon, if I mistake their difference, it is such a trifling one. The act says, "that, after the death or removal of *Dr. Tennison*, the bishop of London is to present first, or, which is all one, the first turn is the bishop of London's, or his successors; but if the king shall present by his prerogative in this case, then the bishop will not present first;" and so the letter of this law will not be fulfilled. I grant it; but the meaning will; for here the king presents by rule of law, and in the right of the bishop of London, the living avoiding by cession, in which case the law takes the presentation from the ordinary patron, and gives it to the crown. And as to the hardship of that, in this particular case, it may be objected, that the bishop may lose his turn. I answer, that is not our present question, whether he will or no, or what will be the effect between the title of the bishop, and the title of my Lord *Fermyn*. But if that should be the consequence that the bishop should lose his turn, the bishop of London's case will be but the same with *Woodley's case*, and the same with the case of every grantee of the next avoidance, who upon eviction by statute or elder grant, or even this prerogative of the king, is to lose his turn: and to this purpose there is another authority that I would mention; and that is *Brook's Abridgment*, tit. "Presentment al Eglise, pl. 52. Now if so, then no doubt it was never the meaning of this act of parliament to tie this presentation, or this turn, so fast about the bishop of London's neck,

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as an incident inseparable, that nothing could take it off; or to give *the bishop* and the *Lord Fermyn* this advowson in such a manner as no patron or patrons in England hold theirs: it was never the intent of this law, to make the presentation to this church a singular instance, * and, different from all the churches of England besides; a peculiar exempt from the ordinary rules and government of the laws and customs of the realm. Such a special meaning should have appeared in special express particular words in the act; and the reason which induced the parliament to this singularity, should have been evident too; else whenever an act gives any thing generally, and without any such special intention declared, or rationally to be inferred, it gives it always subject to the general controul and order of the common law. As, to keep to the present instance, if this living had voided during the vacancy of the see of London while the temporalities were in the king's hands, I take it for undoubted law, that the king, then, and not the successor of *the bishop*, should have presented; and yet the letter of the law had equally as much failed in that case, as in the present case; for then the king, and not *the bishop of London*, nor his successors, had presented. If *Lord Fermyn*, who has the title of his turns in the same words that the bishop has the title to his turns in, should be attainted of treason or felony, the king should present in his turns, and not the *Lord Fermyn*, or his heirs: and here again, the letter of the law would fail as bad, or worse than in the present case, for then the *Lord Fermyn* and his heirs would not only not present in the second turn, but would never present to this church at all. If I have land given or conveyed to me by act of parliament in the usual words of intail, such an estate tail, I take it, is dockable by the usual means of docking other estates tail, except there appears a plain meaning in the act that I should not do it. A grantee of the next avoidance is to lose it in such cases as before, particularly where the living becomes void by cession; but yet such a grantee, if he claim under one who had a power to make such a grant, hath as good a title to it by the common law, as *the bishop of London* here hath by the statute law, for both are but the law of the land, the one as well as the other; and so I see no reason of difference, why the rule of law about the king's prerogative should not operate as strongly upon this latter title, as it does upon the other. MY LORD, I know not what to say further in this matter: truly it seems to me to be very clear of itself; it is one of those *notissimums* where I must confess myself at a loss to find *notiora* to prove it by. When an act gives any thing generally, it gives it subject to the rule and government of the laws and customs * of the realm. This is so evident a truth that I could argue from it if there were occasion; but I know not how to argue to it. If I should dwell all day upon it, I could only twist it and turn it, and shew your lordship a plain thing, and in different lights. And truly the contrary assertion, that the words of this act of parliament have exempted this advowson from the ordinary rules of law, seems to me (I beg your lordship's pardon if I mistake) to be

Savil, 39.

Hardres, 62.

4 Bac. Abr. 647.

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no better than a mere cavil, a playing with the letter of the law; a sticking in the bark, as my LORD COKE calls it, a sort of learned trifling, which, were I never so zealous for my client, I should esteem, as I hope your lordship will, unworthy the grave attention of a court of justice. MY LORD, I shall trouble you no farther, but only to recapitulate the method I have gone in, and so conclude. I hope it appears clear to your lordship, FIRST, That the king has this settled prerogative; that he, and not the patron, is to present upon avoidances by cession.—SECONDLY, That this is not hurt by this dispensation in the *retinere*, but that these livings did avoid by cession only on the first of *July*.—THIRDLY, That there is no difference in law, or reason, between an avoidance happening by cession, immediately upon the consecration, and where it is by cession suspended for a time, especially by such a sort of dispensation as this is, for six months and a few days.—And, LASTLY, That this act of parliament set forth in one of the declarations, makes no diversity at all in law, between the one case and the other. And therefore I pray your lordship's judgment for their majesties, and writs to the archbishop, to admit their clerks, *quia episcopus est pars*.

MR. SERJEANT LEVINS, May it please your lordship, I am of counsel on the other side; and I shall argue both the cases together, as this gentleman has done; because, as to the main point, they are alike; though I think they do likewise differ in several points, which are not so little material as he is pleased to make them; as I hope to prove to your lordship by and by. MY LORD, the record that has been opened I will take as a case, and not trouble you by opening it any more. The parsonage of *St. Martin's* is in the gift of the *bishop of London*, who collates *Dr. Lamplugh*; the king makes *Dr. * Lamplugh* a bishop, and then presents *Dr. Lloyd*, and afterwards makes him a bishop; and then presents *Dr. Tennison*; then *Dr. Tennison* is elected bishop, and there is a dispensation given him, confirmed by the king, to retain this church for above six months; and then he is consecrated. Now, whether after all this, the king shall present a new parson to the living, is the question? Indeed, as to the other case of the church of *St. James* it does not fall out to be the same case appearing upon the record, or that the king has had so many turns in presentation, because it was made a parish by act of parliament, since the presentation of *Dr. Tennison*; and so there hath been no turn to present till now. But as to *St. Martin's*, there have been a great many presentations by the king, one after another; and I know not when they will be at an end after this rate: he has had three turns already, and how many more he may claim by the same title I cannot tell,

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But, MY LORD, that which I have humbly to offer to your lordship's consideration is this, that there arise three points upon the case of *Dr. Lancaster*, as to the living of *St. Martin's*.

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FIRST, Whether the king have such a prerogative as is here contended for? And I take leave to differ from the counsel on the other side in that point; that by law the king has no such undoubted right, in case of an avoidance of a living of which a subject is patron, by the incumbent's being made a bishop, to present a parson to the living.

SECONDLY, Whether the king hath such a prerogative as this *testes quoties*? that as often as he makes a parson a bishop, though he were presented by himself, by such a prerogative before, yet he shall present again.

And THE THIRD is, that which has been touched upon by the other side, whether or no this dispensation and confirmation (admitting the king had such a right to present upon this avoidance, for this time) this *commendam retinere* for above six months, hath not satisfied the king's turn.

These points arise upon this first case; and as to the other, there is only one to be added; whether, in the case of *St. James's*, this act has not made such a difference, as that the prerogative is thereby excluded.

My lord, as to THE FIRST POINT, I humbly crave your lordship's leave to look a little into it; though I know there have been some late cases that seem to admit this prerogative in the king, yet I dare be bold to assert, that the old books are all against it; for I take it for clear ancient law that, where the incumbent * is made a bishop, all his livings become void; and as for the king's prerogative it is all part of the common law, (which is law time out of mind) and if there had been any such prerogative, it would have been known; but in all our old law we are certain it can find no foundation. But, MY LORD, to come close to this first point, that the king hath no such prerogative, upon his making the incumbent a bishop, to present to a church that is another's patronage, I would first mention what I find in that case, which has been cited on the other side. In *Woodley's case*, *Cro. Jac.* 691. HUTTON *Justice* does expressly deny that the king has any such prerogative, or any title to present, except where he himself is patron, and that there was no such presentment till of late days, nor any book of law to warrant it, except the case which is in *Bro. Abr.* "*Pres al' Englife*," 61. but the report of *Woodley's case*, *Cro. Jac.* 691. does seem to admit that WINCH *Justice* was of opinion for the prerogative, and only HUTTON *Justice* against it; for he makes WINCH say, that the king has an absolute title by his prerogative, as well in the case of a common person's patronage as of his own; but if you look into *Winch's Reports*, where the same case is reported, *fol.* 96 and 97. you will there see that they are both of another opinion, that there was no such ancient prerogative; and there it should seem that WINCH did ridicule the opinion of *Brooke*, that it was the saying of the *bishop of Ely*, who was then chancellor, that he might have right to present to it by his place, if the king had such a prerogative.

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prerogative; and indeed, *Brook* himself has made a remark upon it as if it were a thing never heard of before; for at the end of it he puts "*quod nota.*" MY LORD, I do agree that the king has many times presented parsons, in ancient times, to livings of the subjects patronage; but I deny they were *jure prerogativæ*; but upon other grounds; and particularly it was so, 40 *Edw. 3.* 40. There the king presented a prebend, upon making the prebendary bishop: but how came that? the book tells you, because the temporalities of the bishop (who was patron of that prebend) were in the king's hands, and then he presented as patron so long as the temporalities were in his hands; and so is THE YEAR BOOK of 41 *Edw. 3.* pl. 5. A case was cited on the other side, out of the *Abridgement*, but you will find it at large in that book; it was a presentation of the king's to a prebend, because the king had the temporalities in his hand, and there it is a presentation as patron, for so long as they so continued in his hands. So * likewise is 44 *Edw. 3.* 24. 6. The king does there present to a living where the parson was made a bishop; but why was it? not because of this prerogative; there is no such thing mentioned; but the patron was the king's tenant in *capite*, and the heir was in ward to the king, and so he had *jus patronatus* in him. Then there is *Fitz. Abr. tit. "Quare impedit,"* pl. 35. the king claimed title to present to the provost of *Wells*, in the gift of the bishop, void upon the provost's being made dean, because the temporalities of the bishoprick were in the king's hands at that time. And the case that is cited on the other side is, in my opinion, as strong a case against this prerogative as can be, that is 11 *Hen. 4. folio* 37. 59. and 76, the ancientest case of a *commendam* in our law, or that is any where extant in our books; and the case in short is thus: the king brings a *quare impedit*, and makes his title by the creation of the incumbent to be a bishop; there was some debate upon the declaration; but the defendant pleads that the king granted the temporalities to the now bishop, before the living became void; then the king waives that declaration, and makes a new one; and declares upon the statute of provisions, because the pope had usurped a power which that statute denied him, and so it would go to the king; there is no judgment at all given in that case, upon the first point; but it should seem that the king's counsel in that case were of opinion against this prerogative, because they did not stand to that title, but mended their declaration and betook themselves to another title. Now that was a point directly to have been judged upon, if they had thought fit to have abided by it; for the plea of the defendants was no answer at all to the title that the king made; because if the law be, as they say it is now taken to be, the temporalities being in his hand or out of his hand would not alter the case. And this I say is a great authority, that, in so ancient a time as that, the king was satisfied he had no such prerogative, because he waives that title and goes to another. MY LORD, there is a case in the *fourth Institute* 356 and 357, taken out of the record of 24 *Edw. 3.* the king makes the archdeacon of *Cornwall* in the gift of the bishop of *Exeter*, an archbishop in *Ireland*, and the king presents to the archdeaconry; but the observation

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made upon the record by my LORD COKE, is this, that it was not by his prerogative, but because the temporalities of the bishop of Exeter were then in his hands. I * do agree, MY LORD, that there are some late cases that have been cited, which do go that way that the king has such a prerogative; and the first that is to be found in print, is that *case of Wright*, in Easter Term, 37 Eliz. Moore, pl. 522. there indeed this was the point directly in judgment before the court, and there is judgment for the prerogative, though it was opposed by the other side (for this title was demurred unto) but with very little arguments as should seem by the report of that case in that book, for there were only seven or eight precedents of such presentations shewn; and without more ado, the court gave this answer, That it was the settled prerogative of the crown to present, when void by cession, and not the patron, and they would not alter the ancient prerogative: there, I confess, is judgment for the king, but I say without much argument. Then there is the case that has been so often mentioned of *Eeds v. the Bishop of Oxford*, Vaugh. 18; and there indeed it goes so far, as to take it for settled law, as to this first point, that upon avoidance by cession the king, and not the patron, shall present; but, as to the other point, that he shall not present a second time, and so *tries quotics*, I do not know that there has been any authority cited, or is to be found. MY LORD, I confess these two authorities are in point against me upon this first matter; but I beg your lordship will please to consider the times when these two cases were adjudged, and the distance of time between them; the first is 37 of Eliz. the other is 26 Car. 2. But now, MY LORD, I desire to offer what authorities I have to the contrary; I take it, those old cases, that I mentioned before, shew, that the king's title was upon account of the temporalities being in his hand; or by the statute of provisors, and then there being a judgment, one for the king upon the incumbent's being made a bishop, without considering what other reason may be given for it, a little strain might be made to extend it from the other case, and take that of prerogative to be a good title to the king too. But, MY LORD, by what I shall now come to shew you out of our old books, and other authorities, I take it I shall make it clearly appear, that the king has no such prerogative to present to a living in the patronage of a subject that is void upon his making the incumbent a bishop. And * I begin with *Doctor & Student*, c. 31. where he is treating of lapses, and shews how the six months are to be accounted, and there he speaks of the patron being to present, (but no mention at all of the king) within six months after the avoidance by creation, cession, or death; so that then there was no such thing thought of as this prerogative. My next authority is *Dyer* 228. B. *Lord Sidney's case*; there this matter was before the court, though not judicially; for there was issue upon another point which was to be tried, whether the living was void by resignation or deprivation? but there the defendant's title was under the presentation of the queen, "who," says the book, "supposed she was entitled by prerogative to present upon her making the former incumbent a bishop, and the benefice was void by cession;" but my

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my LORD CHIEF JUSTICE DYER has these words very remarkable. "*Quæ nest ley come jco entende, quod alii socii mei sentiebant.*" There you have the opinions of the whole court of Common Pleas, and this is before the case of *Wright v. Moore*. But now, MY LORD, I come to cite a case that was four years after the case in *Moore*, and that is in the 41 of *Eliz*; it is reported in *Owen* 144. There this point came in question directly, whether the king had such a prerogative to present where the parson was made a bishop, yea or no; and there it is said there were eight or nine precedents in the time of *Henry* the eighth, that the king used to present in such a case, but all of them were between spiritual persons, and the court said they would take no regard of those precedents, for they were late things; and truly though THE POPE used before that time to present in such case, yet the pope had used to do strange things by usurpation upon the clergy who were the pope's servants, as indeed he began all his usurpations upon the laity by first usurping upon the clergy, who by degrees brought the laity under them too. So that, MY LORD, your lordship sees how the very pretence of this began, by the usurpation of the pope upon his clergy in such cases; he having all ecclesiastical persons under his girdle, they were his servants, and he could deprive them, or do what he would with them; and therefore he made use of them to hook in his jurisdiction too over the laity. And the clergy have all along, before the reformation, done great things for exalting his spiritual power, and as long as they were under the pope's * girdle, whatsoever he would have was a law to them, which made the *Lord Hobart* 146. entitle the pope *Demon Meridianus*; and *WALMSLEY* in the report of *Owen*, cites a precedent which he says he had seen to be adjudged in the time of *Edward* the second, that the king had no such prerogative. But, MY LORD, I will now presume to shew you the book in print, that he there says he had seen; it went up and down in copies by manuscript long before, but now it is printed by my brother *MAYNARD*, and it is 5 *Edw.* 2. 48; and the case is this: *Hugh de Courtney* brings his *quare impedit* against *Thomas de Hutwat* for the church of *Bingham*, and sets forth, that *Isabel de Force*, countess of *Aumerle*, presented such a one upon the living becoming void by cession, *to wit*, by the incumbent's being made a bishop; but never a word of the king's title in all the case, or any such prerogative, as is now contended for. *Stamford*, in his book of the prerogative, *cap.* 8. is treating concerning the king's prerogative about ecclesiastical livings, but there he takes no notice of any such prerogative as this, either in the statute, or his treatise about it. Therefore I conceive I may well argue, that there was none such; and that the other old cases which I mentioned before in the time of *Edward* the third, were of presentations upon other grounds, which come at last to be extended in these latter judgments as far as to this case, but without any good foundation. And that may be reasonably inferred, at least doubted of, because no ancient book of law gives us any hint of any such prerogative. And that, MY LORD, is all I shall trouble your lordship with upon that point, denying that the
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king has really any such prerogative to present to a church that is in the patronage of another man, when it is void by cession, as by the incumbent's being made a bishop, or the like.

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But, MY LORD, the second point carries this prerogative a great deal further: the king first makes the parson presented by the patron, a bishop; and then by this pretended prerogative, presents to the church so void by cession: then he makes his own presentee a bishop; and upon that presents another; and then makes that second presentee a bishop, and now would present again: and I cannot tell where it will end, if he have such a prerogative of presenting *toties quoties*, though he have done it never so often: if he may carry it on thus, the patron will always be a great way off from presenting to his living. It * is true, MY LORD, in *Eed's case* the king did not only give a *commendam* to *Paul*, when he was made bishop to hold the living, but, when *Paul* died, he gave another *commendam* to the new bishop; the first *commendam* was indeed good, but there is not one word in that book, of justification of this point of presenting by prerogative, *toties quoties*, upon a *commendam retinere*. I agree the parson is in upon the first presentation in the same estate; and so it is positively resolved by my LORD CHIEF JUSTICE VAUGHAN; but that the second bishop should have it, there is not the least word spoken in justification of it; nay, it is adjudged expressly against the second bishop: so that case cannot be made use of for the king's prerogative as to this point. MY LORD, if the law should really be in this manner, that as often as ever the king makes a parson a bishop he shall present to the living, then the patron of a great living shall never have his patronage, but by mere accident; for there are not many great livings in *England*, such as are fit to be given to men of great learning and parts, out of whom, when a bishoprick falls, an election should be made. And thus the king would have opportunity to get all these presentations, and keep them still on; because when a bishoprick falls, he would present such an one, and when another falls he would present another; and so the patron would never come at his living: here have been two already, besides this *commendam* to *Dr. Tennison*, which we say is a third; and to what number it will increase unless the law put a stop to it, cannot easily be foreseen; and this point is applicable only to the first cases, and not to the other where this has never happened till now.

But then the next point which concerns both the cases is, if the king have such a prerogative, whether he be not satisfied with his turn by this *commendam* for above six months, that is, having gone so far as the first of July, when the six months ended the 25th of June. We say it is to be supposed, that the king intended to have his presentee to hold it no longer, but that he would leave it to the patron to present afterwards. MY LORD, these *commendams* have never been of very good reputation, and in the canonists there may be found many hard words against them: in *Davis's Reports*, 76. a. he says, they call it "*communenda quasi compedenda quia ecclesie*"
" *que*

"*quæ traditur in commendam quasi comedetur et devoratur*;" and indeed the *commendams* were many times *ad mensam* of the bishop. My * LORD HOBART cites the council of Lyons as the last council that gave leave to *commendams*; and that council decrees, that a *commendam* should not exceed six months; and that *consensus patroni et omnium qui lædi possunt* should be had; and out of the constitutions of Othobon here in England in the year 1248, a canon *de commendis ecclesiarum*, which, upon the mischief of them, revokes all *commendams*, *nisi ex evidenti utilitate unius tantum ecclesiæ commendatio facta sit*. These *commendams* my LORD HOBART reckons up to be three; the first is *commendam semestris*, and that says he does grow out of a natural equity; that in the time of the patron's respite given him to present in, the church should be supplied with a provisional pastor before a lapse happened. The next is *perpetua* or for life: and the third is *limitata*. Now this *commendam* in our case is neither for six months, or for life, therefore by consequence it must be of the third sort, a limited *commendam*, for it is more than for six months, which was only to supply till a lapse or presentation, and it is not for life. In short it was such an one as THE POPE used to make *ex plenitudine potestatis suæ*; and therefore when THE KING has done that which the pope did *ex plenitudine potestatis*, it must be reckoned an execution of his prerogative. It cannot be in pursuance of the canon which limits it to six months, and no more; if he do it out of his royal prerogative and fulness of power, then this must be an answering of his prerogative as to this turn. This dispensation is the 22d of December, and it is to hold till the 1st of July, and so it might have been as well for sixteen months, or sixteen years: and then I take it, when the king had made such a *commendam*, it had been an execution of his prerogative without all dispute, and he has done all that he can do to present in his turn; for if it should fall out that the king should give a dispensation for longer than six months, and afterwards have the presentation for life too, that would be a strange prerogative; it might first go for twenty or thirty years, and afterwards he present for life at last; which would run into the same mischief as the other point of *toties quoties*; and that would be, I think, very hard to maintain. MY LORD, I confess there have been variety of opinions in the books about the construction of such dispensations as have been made for longer than six months. In *Cro. Jac. 691. Woolley's case*, they say, if a *commendam* be for a time limited, yet the commendatory shall be parson for life, and retain it so; for the king can no more limit the time, than another person can confirm another man's estate for a time only, or an executor's * assent, to a legacy for a time, or a tenant attorn for a time. But, MY LORD, others are of another opinion, that the party shall have the living but for so long time only as the dispensation limits, as my lord Hobart 156. who says a *commendam retinere* may be for years, and for a lesser time than for life; and this opinion seems much more reasonable than the other, that he should hold for life, contrary to the import of the very *commendam*: and truly my reasons for it are these,—FIRST, If the king had not given this *commendam*, the church had been absolutely void upon the

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the consecration of the incumbent; nothing hinders this avoidance but this dispensation, and that very dispensation does not say, that it shall be held any longer than the first of *July*.—SECONDLY, That which is alledged would be as good a reason for holding the benefice after a *commendam* for six months; but that was never pretended to be insisted upon as good, to give a title for life. And this is not like the cases that were put of confirmation, assent to a legacy, or attornment; for there is a prior grant of another man, which is good, but not so firm, till the person the law puts that upon, does assent to it; and when once he hath assented, it is good for the whole estate granted, and cannot be divided; but now here is a parson in that should be out if it were not for the dispensation, which is the only title he hath, and therefore may be limited; and if it should be otherwise great mischief would follow. But, MY LORD, this I say; if it be only for a limited time, I do agree that he is parson for that time, to all intents and purposes; but it being beyond six months, it is by virtue of the king's prerogative, and if so, that will answer his turn, and if it did answer the king's turn, then the benefice became void again, the first of *July*, after the king's turn served; and we have well presented; our clerk is in possession of the living, and the king has no title. And so much for that case of *St. Martin's*.

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As to the other case, MY LORD, of *St. James's*, I shall only trouble your lordship with a very few words. The parsonage of *St. James's* is a new created living, by act of parliament, that bounds and butts the parish, and enacts who shall present after the avoidance by death, or otherwise, of *Dr. Tennison* to wit, the *bishop of London* for the first turn, and the *Lord Jermyn* for the next; and then the *bishop* * of *London* twice, and the *Lord Jermyn* once, and so for ever. Now as to this, with submission, MY LORD, I say, that by this making of *Dr. Tennison* bishop, the living is void of him, and the *bishop of London* ought to have the next turn, and shall not lose it by the king's prerogative, if there be such an one; for this act of parliament having particularly and expressly limited, that the bishop shall have the first turn after the voidance, without saving the king's prerogative, has excluded that prerogative of the king's for this turn; for it creates a particular way and method of the presentation, *et designatio unius est exclusio alterius*. And, MY LORD, though this act of parliament do not name the king, yet I conceive it is the stronger for that, there being more need to have saved this prerogative; because new acts of parliament made for the benefit of the church do bind the king's prerogative unless it be saved; as is held in the case of the king's ecclesiastical laws, 5 Co. 24. and *Magdal. College case*, 11 Co. 67.

And another thing is this; this is a new affirmative law; and though they do not always imply a negative for the abrogation of old laws, yet they do in some cases; and these are two especially: FIRST, If the two laws be inconsistent as to persons and things, which I think is our case, for the statute says the *bishop of London* shall

shall have the next turn after the avoidance, then the king cannot have it by his prerogative; and it is as much as if the statute had said, he should not, because they both cannot do it. A SECOND CASE is, where the new law is for creating something that was not before, there an affirmative law implies a negative, as in *Hobart* 298. the case of *Sleak v. Drake*, and so the statute that appoints writs of error upon judgments in the exchequer to be before the chancellor, &c. no other can intermeddle with them, because it is a new law that creates a new judicature. And, MY LORD, I rest upon this matter, in this case; here is a new church made that was not a parish before, but created by this very act; the presentation is directed in particular and express affirmative words; there is no reservation of the king's prerogative; therefore that is bound, if he had any, though we do not agree he has any: and so we pray your judgment for the defendants.

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* THE LORD CHIEF JUSTICE. I suppose you intend to speak to it again. * [467]

MR. SERJEANT LEVINS. Yes my lord, if you please, some time next term.

THE LORD CHIEF JUSTICE. Why, BROTHER LEVINS, truly as to the first point, I thought it had been too much practised now to be disputed. It was a question heretofore, we know, as appears by that case you mentioned in *Dyer*, and it was a doubt made in *Woodley's case*, in *Cro. Jac.* But, I thought, since *Wright's case*, where it was so solemnly resolved that the king has such a prerogative, it was not to be made a question now. And then, that point was taken for granted, and admitted on all hands in *Eed's case*, in my lord *Vaughan*, and so it has been practised ever since, as appears by this very case before us.

MR. JUSTICE DOLBEN. But it has been always grumbled at, my lord.

THE LORD CHIEF JUSTICE. But it could never be got over.

MR. JUSTICE DOLBEN. The case never came in question; but some judge or other was against it.

* THE LORD CHIEF JUSTICE. The truth of it is, it did import you very much who were of counsel for the defendants (as to the case of *St. Martin's*) to make it a disputable point. If you could take but the point for granted once, that the king had such a prerogative, then the other thing about the reiterating of the presentation *toties quoties*, I doubt would be a hard point against you. * [468]

MR. JUSTICE DOLBEN. My lord, a great deal has been said on both sides; pray let it be argued on all the points when it comes to be spoken to again.

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THE LORD CHIEF JUSTICE. Yes, it will be spoke to again; I suppose, some time the next term, and we will give our opinions with as great deliberation as we can. It is plain in practice, it has been for many years after that judgment, particularly we see within these twenty years past, in this very church it has been experienced thrice, and so it has at *St. Andrew's Hulborn*, in several instances, in our remembrances; and that living is now enjoyed under such a title.

MR. JUSTICE DOLBEN. And the frequency of it, in these great livings, is to me a very great argument against the reasonableness of it; for in *St. Andrew's* the true patron did not present above once in a hundred years, and that was *Dr. Stillingfleet*.

MR. ATTORNEY GENERAL. Then the king has been in possession of this prerogative a hundred years.

* [469] * THE LORD CHIEF JUSTICE. Brother, I say not any thing as to the consequence, but it has been practised and adjudged, and that is a great argument of the law in this case: I give you no opinion now, nor will I enter upon an enquiry into the reasons upon which it is grounded. But it seems considerable that it has the countenance of usage and judicial allowance. And as to the other thing, if the king has such a prerogative, the same reason and occasion happening again, will give him a renewal of his prerogative: and therefore, I say, it was very warily, and perhaps necessarily done of you who are for the defendants, to make it the main point in dispute, for it concerns you very much to have it so.

MR. JUSTICE DOLBEN. I pray, my lord, let us deliver no opinion till it be argued again.

THE LORD CHIEF JUSTICE. I do not give my opinion brother.

MR. JUSTICE DOLBEN. No, my lord, it is a case of great consequence; and that point I desire may be argued as well as any of the rest.

THE LORD CHIEF JUSTICE. But, brother, if I be ready to give my opinion, I hope you will not restrain me.

MR. JUSTICE DOLBEN. If it be to be argued again, I desire the whole case may be argued intire.

* [470] * THE LORD CHIEF JUSTICE. Well brother, I tell you I do not give any opinion, but only we are breaking the case that we may shew what is a doubt with any of us. And as to that point of the dispensation and confirmation, being an user of the king's turn, it is agreed, I perceive, that thereby the incumbent is in upon his former title, and then if it come to be void, how comes it to be void? Is not the promotion the avoidance? Certainly it is. For the dispensation only prevented it for such a time as the dispensation is in force.

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MR. JUSTICE EYRES. And as for the prerogative, the question is, whether this be such a prerogative as the law allows, and whether the dispensation be such as is incompatible with the prerogative. The prerogative has received judgment, though as my brother DOLBEN says, it has been always opposed too. And this dispensation is not sure a serving the king's turn, by reason that the king is not to have any benefit by it; it is only to prevent the avoidance which makes the king's title, and therefore suspends his title, but does not fulfill it

MR. JUSTICE DOLBEN. The patrons of the great livings in England have a very hard case of it if this be law, and the church will suffer by it too; for there is no one that has a great living, but will present a blockhead that is not likely to be made a bishop, to preserve his presentation.

THE LORD CHIEF JUSTICE. But surely as to the other case of *St. James* upon the act of parliament, it has a great deal of weight in it, for this being a new parsonage created by act of parliament, the execution of the limitation of the advowson of the act ought to be pursuant to the act. If the limitation had been once executed, and advantage * taken thereof accordingly, then upon the happening of such a case for the prerogative, it might have been something. But now the act of parliament having expressly appointed, that after avoidance as to *Dr. Tennison*, the *bishop of London*, or his successors, should present, whether that would be complied with if the king should now present upon this avoidance, is a point worth consideration.

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MR. COOPER. My lord, if it be otherwise, that will be to construe this act of parliament to make this parish a single instance different, as to the title of the advowson, from all the parishes in *England*: certainly, my lord, it was only meant to declare the right of presentation in whom it should reside, but not to prevent any legal title, that according to the rules of law should intervene.

MR. JUSTICE DOLBEN. As to the usage, I confess 'there are some precedents, but they do not make the law; and as for *Eed's case*, I know what a noise it made in the world, and SIR JEOFFRY PALMER who was then attorney general was of opinion that there was no such prerogative; and the judgment of that case went upon another point, because it voided by the death of *Paul*; and so I do not take that to be so strong an authority.

MR. JUSTICE EYRES. But then there is the case in 2 *Rolls Abr.* 344.

MR. JUSTICE DOLBEN. That was but the opinion of *Rolls*.

THE * LORD CHIEF JUSTICE. I remember that at the time of that case of *Eed's*, it was taken notice of, that a clergyman was the first man that ever questioned the king's prerogative, but we will not trouble ourselves any further with this matter now; let it be argued again.

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MR. ATTORNEY GENERAL. When is it your lordship's pleasure it should be spoke to again?

THE LORD CHIEF JUSTICE. It cannot be this term. Take your own time next term. Some time in the beginning of the next term.

A statute erecting a new parish and a new church, and appointing that A. and B. shall present by turns on the next avoidance, A. to have the first turn, and B. the second, does not take away the king's prerogative to present on the next avoidance made by the incumbent being created a bishop, although there is no saving in the statute of the king's prerogative.

MR. FINCH. My lord, I am of counsel in this case for *Dr. Birch*, and we hope, notwithstanding what MR. ATTORNEY has now offered; we shall have your lordship's judgment for us. I need not open the record at large, because MR. ATTORNEY has done it already.

The questions that have been made in this case have been,

FIRST, Whether the king have any prerogative at all, such as is claimed in this case?

SECONDLY, Whether if the king have such a prerogative, that be not served by *the commendam* in this case. And,

THIRDLY, Which is the point now; whether this act of parliament has made an alteration in this case, to differ it from the other of *St. Martin's*, supposing the king had such a prerogative in an ordinary vacancy,

The two first points have been adjudged already in that other cause, and so I shall not take upon me to argue them now, but only consider this case as it stands upon this act of parliament.

And there, MY LORD, the question will not be, whether this act of parliament has not taken away the king's prerogative; but whether or no in this case, as it stands before your lordship, the king has such a prerogative as will affect this case: though I will not at present meddle with the point that has been settled, yet I must beg leave a little to observe the authorities that have been urged for it, and the books where it is adjudged, and the reasons of those authorities: and, FIRST, I think, MY LORD, I may venture to say thus much to that point, that before the time of *Queen Elizabeth*, there is no resolution of any case to be met with in any of our books, that proves this point to have been so adjudged. For the year book of 11 *Hen. 4.* with submission, I think, if it be considered, will rather be an authority against it; I am sure it is far enough from being an authority for such a prerogative in the crown. And I would only mention this to your lordship, because I find formerly all the presentations made by the king to any church where another person is patron that we meet with in the books, were either where the bishop's temporalities were in the king's hands, or by reason of the wardship of the patron. I mention this, because if it had been such an ancient prerogative as is pretended, some resolution

tion about it would appear in THE BOOKS, and the reason of such resolution beende clared, that so it might serve to govern other cases by. In the case of *Wright*, in *Moore* 99. it is adjudged, indeed, that the king has such a prerogative, but upon what reason was it so judged?; the book tells you, that it was upon precedents shewn; but what were these precedents?; the book does not say they were precedents of resolutions in point, but of practice and usage by the king. In the case of *Wentworth v. Wright*, as it is reported in *Cro. Eliz.* 526. it is said it was adjudged upon precedents shewn, and there is some attempt made to give a reason for it, namely that the law gives the king this prerogative, because of the advancement of the incumbent to a higher dignity; I suppose the meaning of that is, it is in recompence of so great an honour done to the incumbent of the patron, by making him a bishop. Then another reason is, the loss that the king has by parting with the temporalities of the bishop, which, during the vacancy, he kept in his own hands. But that, MY LORD, is a very odd reason, and, with submission, seems to have no very good sound, that the king's restoring the temporalities, which is the patrimony of the church, should have a recompence required for that act of justice, as for a loss; much less would it be reasonable that that recompence should be carved out of the inheritance of another person. And then the last reason that is given, is, because the king, by promoting the incumbent, is the cause of the avoidance. Truly, * MY LORD, I think, with submission, it had much better have rested upon the first reason, because the king bestowed such honour upon the patron's incumbent, than to have gone any further with the other reasons, or rather it would have done well to have stopped with this answer, as I remember one book says, "it is one of the prerogatives of the crown, of which no reason can be given, but that so it has been done:" and if that be the foundation of the judgment, then, as to this point, the case is ruled upon the ancient usage of the crown. Usage then must be the measure of the king's prerogative in such a case, and then I may take leave to argue that where there is neither reason or law, practice, or usage, nor any judicial resolution to warrant it, there can be no such prerogative in the crown; where it is founded upon usage and practice, that usage and practice must limit it, and you cannot go beyond that. Pray then, give me leave to consider this case as it stands before your lordship. In the case of a donative, as has been observed in the former arguments, (for indeed I think there is little that can be observed in this case that has not been mentioned before) there is no such prerogative, and yet there the same things that are given as reasons, are all found as in the other case; it is the king that prefers the incumbent, and loses the temporalities, and is the means of the avoidance. And therefore since, though there be the like reason, it is agreed that there is not the like prerogative, it must rest upon this, that so it is, because there is not the like usage and practice; for it seems the practice is only where the patron's claim comes in by presentation, and not where he was in by donation. Now, MY LORD, this case before you, I must take leave to say, is a case that comes neither within the usage, nor within

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any of the imagined reasons upon which this pretended prerogative is founded.

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FIRST, *Dr. Tennison* the now *bishop of Lincoln*, came into this living by donation of the act of parliament, and not by presentation, or collation from the *bishop of London* as patron; he was in it as of a donative, and therefore the act of parliament thought it absolutely necessary to insert a clause to subject this church to the ecclesiastical jurisdiction of the bishop of the diocese; otherwise, upon the bare erecting of this into a new parish, it might have been a donative exempt from the ecclesiastical jurisdiction. If then this be a donative, the patronage arises not to the bishop, till it becomes presentative, which must be after the avoidance of this donation by the act of parliament, for so the very words of the act are, "That the advowson and patronage after the next avoidance, shall belong to *the bishop and my Lord Jermyn*." I cannot agree with MR. ATTORNEY in his imagination, that the *bishop of London* was still patron of this living, because he was so of *St. Martin's*. I think that point would be very hard for MR. ATTORNEY to maintain; this being wholly new created as a distinct parish by this act of parliament, and a distinct benefice from that of *St. Martin's*, the one could have no influence upon the other. For I believe he will hardly be able to maintain, that if the bishop presented any one after *Dr. Tennison* had taken a second incompetent living, that he could maintain a spoliation in that case; for he does not come in under the same patron, as to this living, but only by act of parliament. And then, besides, as the patronage and advowson is in *the bishop*, and my *Lord Jermyn*, after the next avoidance, and not before, by the very words of the act of parliament, so I would observe further, that there is another particular clause in the act, "that the succeeding rector, after the death or avoidance of *Dr. Tennison*, shall be presented by *the bishop of London*, and the next to him by *the Lord Jermyn*," which shews that, without these clauses, this was such a church as wherein the king's prerogative could never obtain, because it was merely a donative; and without these special provisions it would neither have been presentable, nor subject to the ecclesiastical jurisdiction; and then it is more like the case of a donative, than of an advowson, in which the king has a prerogative according to those authorities. Now, I would suppose that an act of parliament should be made, that after the next avoidance of a donative, the patron shall present one to succeed; in such a case, if the king make the incumbent of the donative a bishop, would the prerogative work upon that avoidance, so as to let in the king's presentee in the first instance? Surely no, my lord, for till the act was made it was a donative, and not subject to the prerogative; and after the act made, it is no such case as entitles the king to such a prerogative by practice and usage. Then, let us see what our case is here; the first instance of a presentation is after this avoidance, and to say, that when the act creates the advowson and patronage, it is subject to all the rules of law that affect other advowsons, comes not up to this question. For till a presentation has been made to this

this living, it is but a donative, and that has no such matter as this prerogative should work upon; for with submission, * it becomes not an advowson till after the avoidance; and to object that this is to create a strange sort of living different from all others, which certainly the act of parliament never intended to do, is not applicable here neither; for the question is of a church that never was presented to before the avoidance happened; what it will be after it is become presentable, and has been presented to, is time enough to consider when that comes to be the case; but ours is a question concerning the first presentation to a new erected church; and we hope the act of parliament that makes it presentable, must be the guide of that matter; and where that act gives the first presentation, certainly the person to whom the presentation is given by the act, must enjoy it according to the act. Now the first presentation in this case is given by the express words of the act to *the bishop of London*. But, says MR. ATTORNEY, this may be taken as the gift of the next avoidance, and then the king's prerogative will operate upon it, as it would in other cases against the grantee of the next avoidance. For the other turns, there is another provision made, that after my *Lord Fermyn* has had one turn, the bishop is to have two for one, and he would make the act of parliament's appointment of *Dr. Tennison* to be the first incumbent to be in the nature of one turn to the bishop. But sure that is a very strange imagination, that because the act carved this living out of another, whereof the bishop was patron, and gave the present incumbent the new erected living, that this should be taken upon as the bishop's turn, when by the very act the bishop had no turn till the avoidance. I grant the case, that the grantee of the next avoidance would lose his turn by this prerogative; and that is, because the grantor could grant it no otherwise than he himself had it, that is, subject to the king's prerogative. But I do not find that ever it was adjudged, that the king, if he be patron, and make a grant of the next avoidance, and then make the incumbent a bishop, shall defeat his own grant by this prerogative. It never has been adjudged so far yet; and this case I take to be much stronger, it being the king's grant in parliament. I believe MR. ATTORNEY would have a very hard point in that case to maintain the king's prerogative against his own grant. MY LORD, to let in the prerogative in this case to defeat the bishop's presentation, is to overthrow the express words, and meaning of this act of parliament, unless they will say, that this avoidance, by the promotion of *Dr. Tennison*, is such an avoidance as is not meant by the act that says, "after the next avoidance * the bishop shall present," that is, say they, the act means other avoidances, but not this by cession. I see not truly how such a construction can be made, for it is such an avoidance as makes the living void, so as to let in another to be presented, and would let in the next presentation of the patron, were it not for this pretended prerogative: why then must it not mean such an avoidance as well as any other, since the act does not particularly mention what sort of avoidance it is? sure it must be such an avoidance that the bishop must present in, or lose his turn, which the act

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expressly gives him. So that, MY LORD, I take it, with submission, this avoidance being the meaning of the act of parliament, then this law that does create this new advowson, directs the first presentation to be by the bishop, which expressly excludes all others. When this avoidance happens, this first presentation is to take place, and then, and not till then, it is presentative, and consequently the prerogative cannot operate upon it. What the consequence may be hereafter is not at all to the present question. Perhaps all may be let in that other presentative churches are subject to, when once it has been presented to: but for the present case, for the reasons that I have given, I must pray your lordship's judgment for the defendant; for all those arguments that this is to erect a new sort of church different from, and not subject to the rules of law in other churches, are not at all in the present question: for we are singly upon this question, who shall present the first turn to a new church, erected by a new act of parliament, which limits the first presentation to the *bishop of London*.

THE LORD CHIEF JUSTICE. I suppose you intend to speak to it no more, do you?

MR. ATTORNEY GENERAL. No, my lord, I think not.

THE LORD CHIEF JUSTICE. It has hung long enough; it is time it were made an end of.

MR. ATTORNEY GENERAL. My lord, we submit it to you.

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* THE LORD CHIEF JUSTICE. Well, we will take a little time to consider of it.

MR. ATTORNEY GENERAL. Some time this term if your lordship please.

Then THE JUDGES consulted together.

THE LORD CHIEF JUSTICE. We will give our opinions to-morrow seven night.

SIR HENRY GOLD, their majesties *serjeant at law*, argued for the king and queen. May it please your lordship to spare me a word on the behalf of their majesties, the king and queen, who are plaintiffs in this *quare impedit*. SIR BARTHOLOMEW SHOWER has put the case at large upon this record, and has put the points upon the bishop's demurrer, to our declaration, and what appears in the declaration itself, for there the act of parliament is set forth, and that makes the case now in judgment before you. It does appear in the declaration, that this *St. James's* is a new parish, erected by act of parliament, and taken out of the parish of *St. Martin's*, whereof the bishop was patron, and *Dr. Tennison* incumbent. The act of parliament enacts first the creation of the parish, and makes it a rectory, and then enacts the patronage and advowson, and presentation to the rectory, which is, "that it shall appertain and belong," and by that act is vested in the *bishop of London* and his successors, and the *Lord Fermyn* and his heirs, in this manner, viz. "that *Doctor Tennison*, shall be the first rector, and after his death

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or avoidance, the first rector shall be presented by the *bishop of London* and his successors; and the next after that by the *Lord Fermyn* or his heirs; and then twice by the bishop and his successors, and then once by the *Lord Fermyn*, and so by turns, twice and once for ever." *Dr. Tennison* is consecrated *bishop of Lincoln*, * upon which their majesties present their clerk as by prerogative they ought, but the bishop refuses to admit him, and upon bringing this *quare impedit*, demurs to the declaration. With submission, MY LORD, the king's prerogative shall prevail, as we hope to carry this presentation. For if you please to consider the act, that makes it plain in several parts of it.

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FIRST, Consider that part of the law that creates it a parish, and settles the advowson, rectory, and patronage in the bishop and my *Lord Fermyn*, before you come to the first rector; for it makes a new parish of part of the old one, and makes it a successive rectory, and enacts that the rectorship be presentative, and so annexes the patronage and advowson to it, and vests it, in point of inheritance, in the bishop and my *Lord Fermyn*. Now, suppose it had been vested there, then plainly it could not have altered the operation of this prerogative in law upon it; for here had been an advowson vested in inheritance, and then it would have been subject to the prerogative; for I do take upon me to affirm, that whether it be an old presentative church, or a new presentative church, wherever it is presentative, the king shall have his prerogative. There is no more difference between them, than between an old bishoprick, and a new one created by act of parliament; which I shall shew anon, is none at all. MY LORD, I see the objection that *SIR BARTHOLOMEW SHOWER* makes; he would not have it an advowson until after the death or avoidance of the church, that is, the very time says he, that it becomes presentative first. Truly, I take it to be quite otherwise; and so should he too, or else it would not serve his turn, as I conceive, for I take it to be an advowson presently vested in inheritance, as much as a devise to one, *when* he is one and twenty, that is the time of possession, but the estate vests presently. It is in the words of my book *patronatus*; "the advowson shall work presently, the presentation when the avoidance happens." But, taking it as he would have it, yet it will not avail him, as I conceive, for the advowson. Suppose it should vest just as the avoidance happens, then there is an instant of time when it vests, and even in an instant our books are for the sake of the king's prerogative, there shall be a priority and a posteriority to save the king's prerogative; according to *Habs's case* and *Sadler's case*, Co. 4. 55.

* But, there is no difference, I say, between a new rectory created by act of parliament, and an old rectory, as to this matter, any more than there is between a new bishoprick and an old one. Now in the case of the new bishopricks, which were made 31 Hen. 8. c. 9. which gave the king power to found bishopricks when they were so; all the incidents followed upon the foundation, which belonged to the old bishopricks at common law. And so it was agreed in the case

Repealed by
1 & 2 Phil. &
Mary, c. 8.
3 Eliz. c. 1.

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(a) 3 Keb. 472.
266. 540. 560.
2 Lev. 136.
Pursh: 34.
1 Freeman: 394.

of *Ridley v. Fournier*, (a) about the register of the *bishop of Worcester*, that he had the same power by the new creation that the old bishops had; and that if he had granted the office immediate between the statutes of 1 and 2 of *Eliz.* he might have granted it as he pleased: and the like was held in the case of *Bristol v. Stamp*, in the Common Pleas, *Mich.* 5. of this king and queen. After the statute of 31 *Hen.* 8. c. 9. the king by *brevis patent.* in the thirty-third year of his reign, did found the bishoprick of *Worcester*, and that the bishop for the time being new founded, should grant the office of his register, as other bishops used to grant theirs; the bishop made a grant; it happened there was no such grant by any other bishop; the question was, whether, it being found that the bishop of *Worcester* did grant so, this should be adjudged a good grant? for that it differed from the others, and it was held——

But in that case it was held, when the bishoprick was founded, there doth all the incidents follow with it, presently upon it; and when this was done, it was done by act of parliament; yet the election must be by *conge d'esire*, and all the prerogatives belonging to the bishoprick were to be accordingly, as in all other cases: so here, when this parish is created by act of parliament, it is subject to the rules of law, as all other parishes are. In the Year Book, 11 *Hen.* 7. 19. b. there is a case of an office, found, that *A.* was seised of an advowson in fee held of the king as of his crown, and died, his heir within age; and that a stranger was seised of ten acres of land, held of another by knight's service, and in fee of *A.* and others to the use of *A.* and his heirs. *A.* dies, and the other survived; upon the death of *A.* the king entered; there *LEDASWICK* argued, that the entry was not good; but he makes a difference where a thing is by the common law, in which the king shall have prerogative, and that thing is enlarged by statute, the king shall have prerogative in that enlargement; and he puts this case for instance. Suppose forgery be made felony by act of parliament, there the king, * as in another felony, shall have the year, day, and waste. If the act had rested here, and gone no further, then it had vested the patronage and advowson in the bishop and his successors, and the *Lord Jermyn* and his heirs, and plainly they had been tenants in common, and the bishop should always have collated; for the same reason that is given in the case of copartners, *Co. Lit.* 163. Now to prevent that inconveniency, the law makes a partition between them, that they are to present by turns, which is the proper way of partitions of advowsons, and so does this act in this case afterwards, viz. two turns to the bishop, and one to the *Lord Jermyn* and his heirs. That, now, MY LORD, is the true and natural construction of the thing, as to the fixing the first presentation in the bishop; for I take it plainly, it is a dividing the inheritance, and making that useful to my *Lord Jermyn*, which otherwise could not have been but useless to him, if they had continued tenants in common. It was not to erect a rectory, different from, or contrary to all other rectories, or to annex this advowson and presentation so to the bishop and the *Lord Jermyn*, as to exclude the king's prerogative, which is as ancient as the law. That is the consequence, if their argument be true, that because these things are not particularly

saved, they shall be excluded. But we say, because they are not particularly named, therefore they shall work as all incidental things to other advowsons will work, as lapses and the like; but there would be no lapses to the archbishop or to the king, if what they say held good, because they are not named neither; for if you allow the one, you must allow the other upon the same reason: so it would be if the act of parliament were so strait laced, that because there is no particular saving, all should be excluded. I will so far come up to SIR BARTHOLOMEW SHOWER, as to agree, that had the parliament made it a *donative* it had been quite another thing, as it might have been, though a parish church, according to *Co. Lit.* 344. a. Yet if there once be a clerk presented, and admitted, and instituted, this is now become a presentative church; and the first time that it becomes a presentative, it become subject to all incidents of other presentative churches; for, as that book says, then shall incur a lapse to the ordinary, as of other benefices; and if it be so subject, as soon as ever it become presentative, the king shall have his prerogative operate upon it too, as well as the ordinary. The king could not have it indeed, till upon the presentation, because it was a donative, which it is not here; for though he says that the king must stay for his prerogative till * an actual presentation, yet, I say, that as soon as ever it is presentative, it is subject to the king's prerogative.

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Cro. Jac. 63.
Fitz. N. B. 35.
22 Hen. 5. pl.
26.
2 Bl. Com. 24.

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There is one thing more that he has objected. The act of parliament says expressly, "that *the bishop* shall present upon the death or "next avoidance by *Dr. Tennison*," and so this prerogative, and the act of parliament cannot consist, and therefore this shall work out the prerogative; that I deny: I do agree if the parts of an act of parliament cannot consist, the latter must be a repeal by the former. But this avoidance spoken of here, is an ordinary sort of avoidance by death, resignation, or taking an incompatible benefice; a patronage avoidance, and not prerogative avoidance. And I will put you one case, which you may find in *Owen* 116. *Knowles v. Powell*. It is there said by EGGERTON, *Solicitor*, that in 4 *Eliz.* it was adjudged in the Common Pleas, that if the queen make a lease under the exchequer seal, to begin immediately after the forfeiture, surrender, or expiration of a former term, and the lessee is outlawed, the second lease shall not commence; it is a prerogative forfeiture, and not that mentioned in the lease.

As to the objection that has been put of the not saving the king's prerogative, and the express words of the act, I would say this further to it, that the words of the act, that the first rector shall be presented after death or avoidance by the bishop that is, his turn shall be first only by way of preference to the *Lord Fermyn* and his heirs, and it is no otherwise possibly to be taken; for the clause of first rector, is not a clause of creation, but rather of explanation, for it is handed in by a "*viz.*" So that it comes in consequently upon the foundation, how the patronage and advowson should be distributed after the death or next avoidance, and where it shall be

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lodged to be vested as to presentation, that is, by turns, first, by collation by the bishop, then by presentation by the *Lord Jermyn*, and it would be hard if in this, the king should lose his prerogative by construction, when there is express law for it, and that for these reasons; FIRST, His prerogative is a favourite of the law. SECONDLY, If you consider it by the common rule, the king is not bound by an act of parliament, except it can appear by some particular thing in the act, that he was intended to be bound, as in *Plow. Com.* 11. and 243. but all are to be construed in favour of the crown, and to preserve his right. THIRDLY, In all cases general words shall not exclude the king, or carry it against the prerogative; so is the case in 2 *Hen.* 7. statute, the king grants to one all issues, fines and amerciaments * of all his tenants in such a lordship; the question was, how far this grant would extend; and it was held it should not extend to royal fines and amerciaments, which are declared to be the fines of his great officers, for their misdemeanours: so by a grant of mines, royal mines do not pass; and so it is hard the king should be barred of his prerogative without an apparent intention to bar him; and there is a particular rule taken in *Magdalen College case*, 11 *Co.* 74. b. that where the king has any prerogative, estate, right, title, or interest, by general words of an act of parliament, he shall not be barred of them; and so, my lord, it would be hard to exclude the king in this case from his prerogative, by these general words.

It has been objected, that this is a new act of parliament; and this is made for the benefit of the church, and therefore the king is bound by it; and he cited several cases, and among the rest that which I mentioned, *Magdalen College case*, but that comes not to our case. There is no doubt but that the king is bound by the statute of the 13 *Eliz.* c. and all other laws made for the church to preserve the revenues of the church, and wherein the church has a manifest advantage, but there is another reason given there, for they would have made the king to be an instrument of fraud, which the law abhors. But let them put me one case, if they can, where there is an act of parliament relating to the church, and the king's prerogative, relating to the matter of the act, is such, as by which the churches have no loss, that it was ever adjudged that the king's prerogative is shut out, though not saved or named. Besides, MY LORD, this advowson is part here in the church, and part in lay hands; and by this prerogative the church is at no loss, for it is with this church, as it is with all other churches presentative besides.

Then they say that it is an affirmative law, and implies a negative, the words being general, and that by such an affirmative general law the king is bound, as well as all other persons. No doubt but it is thus where the king has an interest, and an affirmative law is made against him; but I would put you two cases, the one is in the *first Institute* 115. a. That an affirmative act doth not take away

away a custom (a) as the statute of wills does not take away a custom to devise. The other is the case of *Clench v. Cudmore*, in the Common Pleas, Easter Term, 3. of this king and queen, Roll 304. So * say I, this case, though the act be an affirmative law, yet being general without the saving of any right, in consequence the king's prerogative is saved. Nay, I shall go yet a little further to consider that matter. He tells you (and I would agree it) his client *the bishop* was patron of *St. Martin's* originally, and therefore there was all the reason in the world, the patronage should be continued in him. So that I take it, it is in the nature of a *salvo jure* to the king's prerogative, that as the patronage continued so should all the incidents to it.

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MY LORD, for that which he says, that *Dr. Tennison* came to be first incumbent by parliament, I think it may receive this answer, from what was said just now: he was incumbent of the whole before, and the making him to continue incumbent still, that is a saving to him of his right to the living; and then as the parliament takes care that there shall be a right saved to the one and the other, the bishop, and the incumbent, why, in consequence there should not be the king's right saved as to this incident prerogative, I can see no colour of reason in the world, nor that there is any need that he should be particularly named, when it is a royal prerogative, and springs by operation of law, as charged upon all presentative livings, and therefore it would be vain to say, that this presentative church should be subject to it.

So that, MY LORD, I take it upon these considerations and reasons which I have mentioned, that as to the king in this case, his right is saved to him by construction of law, as it is given him by operation of law, to all presentative churches, and therefore I humbly conclude for their majesties the king and queen; and pray your judgment for them, and a writ to the archbishop to admit their clerk.

THE LORD CHIEF JUSTICE. It has been well argued on both sides truly: I suppose you intend another argument.

SIR BARTHOLOMEW SHOWER. Yes, my lord, my clients do desire another next term, if you please.

MR. ATTORNEY GENERAL. I do not question but you desire to delay.

* SIR BARTHOLOMEW SHOWER. This is the first time that this point has been argued, • [485]

(a) In 2 Inst. 200. Lord Coke expresses his opinion upon this subject more particularly, viz. "a statute made in the affirmative without any negative expressed or implied, doth not take away the common law," and this, says Mr. Hargrave,

Co. Litt. 115. a. note (8) seems to be the justest way of stating the rule, which is very common in the books, both as to common law and customs. See also Plow. 113. 4 Com. Dig. 339. 432. Dyer 373. 2 Bulst. 36.

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THE LORD CHIEF JUSTICE. We can hear no other argument this term: nor, indeed, do I believe either side can be ready.

MR. ATTORNEY GENERAL. We must submit, MY LORD, if you please, to put it off till next term.

THE LORD CHIEF JUSTICE. The matter in debate is, whether the king's prerogative be not consistent with this act of parliament, for that this is not the subject matter of the act. Now we must consider the design of every act, which was here to make this a new parish, to settle the right of patronage, and then to make distribution of the patronage according to that right which they thought fit to give to each one. Now when the act of parliament has done this, and they are thereby made patrons to all intents and purposes, as if they had been in an ancient right, whether this act be not fully satisfied by this, whether the king be mentioned in the act or not, as to his prerogative, is the thing to be considered. Because the parish is so large, therefore there is another taken out of it, and the limits of a new parish set out, and regulation made of the patronage and advowson. Now, if there be a new rectory created, and the right of patronage is settled generally, I think it would be hard to distinguish that from a common case as to the prerogative; but here is a particular right and presentation given to my *Lord of London*, he to present one time after the first avoidance; and then my *Lord Jermy*, he is to present another time; whether or no this being so settled, when the act says expressly he shall present, this be not a distinct right of presentation for that time different from the ordinary course? or whether it be not a present advowson vested in inheritance, as to one part in my *Lord of London*; as to the other in my *Lord Jermy*, is the main point in the case. Now, BROTHER GOLD, you say this is a prerogative avoidance, I take it not to be so; it is an avoidance by law, as much as if he had taken a living incompatible; for if he had done so without a dispensation, would not that have avoided both these livings? certainly it would; therefore it is not an avoidance by reason * of the king's prerogative, but because it is another preferment in the church incompatible with that of holding this living; and then you put the case of *Knolls v. Powell*, in *Owen* 116. which is likewise reported in *Moore* 237. twice by the names of *Knolls v. Luce*; and the last is that case cited by EGGERTON. The term forfeited by outlawry, is a royal forfeiture and not the forfeiture meant as to the second lease, which was really so; but for what reason? because in that case the term forfeited has still a being, and the king claims as assignee in law; but if the king have the reversion where the term is extinguished by a forfeiture, the second lease will commence: therefore, though the means of the presentation *hac vice* coming to the crown be by prerogative, yet the avoidance is by operation of law. These things are considerable; I deliver no manner of opinion now, but only mention what I take to be the main point in question.

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MR. JUSTICE GILES EYRE. Truly, I take it, the question is no,

no more; but whether this act of parliament (being a new act) shall bind that which it had no intention at all to meddle with.

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THE LORD CHIEF JUSTICE. Well, we will hear you to it some time in the beginning of the next term.

MR. JUSTICE GILES EYRE. This case upon the record is but shortly this. A private act of parliament is made, 1 Jac. 2. to make a certain precinct of the parish of *St. Martin in the Fields*, and a distinct parish church of *St. James*, within the liberty of *Westminster*, and to be a perpetual rectory with cure of souls. And the act directs or orders, that the then vicar of *St. Martin's* (for it takes notice that he is so) *Dr. Tennison*, shall be the first rector of this new parish, and then settles the patronage, advowson, and presentation, to this new rectory after the decease of that rector (which was *Dr. Tennison* named in the act) or the next avoidance thereof, in the bishop of London, and his successors, and my Lord *Fermyn* and his heirs, in such manner as is there expressed, *to wit*, the first rector after such decease or avoidance to be collated by the bishop and his successors; the next * after that to be presented by my Lord *Fermyn*, or his heirs, and then the act gives two turns to the bishop, and his successors, and one turn to the Lord *Fermyn*, and his heirs for ever. After this act so made, *Dr. Tennison* who was made the first rector by the act of parliament, is elected bishop of *Lincoln*; but before consecration, the archbishop doth dispense with him to hold these two livings in *commendam* from the twenty-second of *December* 1691, to the first of *July* following, which dispensation their majesties, according to the act of *Hen. 8.* confirm, and then the bishop is consecrated, and holds this rectory and vicarage together with his bishoprick till the first of *July* following, and then this rectory of *St. James's* became void by cession. And my lord bishop of *London*, it being within his diocese, collates it to the defendant *Dr. Birch*, and the king and queen by prerogative present their clerk, but the bishop refuseth to admit him, upon which this *quare impedit* is brought by their majesties to recover this presentation to which the defendant *Birch* pleads this special matter, and MR. ATTORNEY has demurred to his plea. And I am of opinion with my brother, that judgment in this case ought to be given for the king and queen, they being by their prerogative well entitled to this presentation and dispensation of the archbishop, nor the statute for making this a parochial church has not any ways debarred their majesties of this prerogative presentation. It is agreed by all, that where the incumbent is made a bishop, the advowson by his consecration becomes void: but whether this were an avoidance by the common law, or by the ecclesiastical law of the kingdom, was the doubt, which as I take it, occasioned that variety of opinions in our books between the king and the patron, which should have the presentation. Those who held the patron should present, do also hold, that this avoidance by cession is an avoidance by the common law, which occasioned the error, I think, of denying the king this prerogative which I am of opinion he has; and that this avoidance is an avoidance by the ecclesiastical law of the kingdom, and not otherwise an avoidance by the common



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common law, than as the ecclesiastical law is part of the law of the kingdom. And as the law of holy church originally made this avoidance, so it may at the time that it makes it an avoidance, provide that the king himself, who makes the promotion that causes the cession as supreme ordinary, shall present upon such avoidance: and the patron is not thereby prejudiced; for by his * presentation of the incumbent who is afterwards made a bishop, he had dismissed himself of the avoidance till the death, deprivation, or resignation of that incumbent. And that the church is discharged of the incumbency by this promotion and cession, appears by THE YEAR BOOK, 11 Hen. 4. fo. 60. b.; and the case of *commendams*, Davis 81.; and the case of *Eed v. the Bishop of Oxon*, Vaughan 22.; wherein there are so many excellent reasons given to contradict what my brother says, that it is an avoidance by reason of the incompatibility of the bishoprick and the incumbency, that I should do him a great deal of wrong to mention all that I find there to that purpose. And the fact is plainly otherwise: for it is plain, there can be no incompatibility in the things themselves, because many bishops do hold livings for ever in *commendam*, as annexed to their bishopricks, and particularly the bishop of *Winchester* has two. The avoidance is only by the constitution of the church, for the bishop was originally incumbent of all the livings in his diocese, and the clerks all employed under him as his vicars and curates. And, that the king has such a prerogative of filling a church so void by cession upon promoting the incumbent to be a bishop, is plain in 2 *Rolls Abr.* 393. and *Wright's case*, in *Moore* 399. where it is resolved, that so the law is by multitudes of precedents, and authorities there produced, and considerately perused. I confess those precedents are, that so it had been used and practised, precedents *de facto*: but, I pray, can there be a better title to any right than continual usage even in the case of a common person? continual usage in the case of the king cannot be but by matter of record; and when precedents of such an usage for the king from time to time are produced, can there be a better or a stronger argument of a title for the king? and the case of *Eeds v. the Bishop of Oxford*, admits it beyond all dispute, for there they will not so much as let it be argued: and so *Cro. Eliz.* 790. and 2 *Rolls Abr.* 344. all say that the king has an undoubted prerogative to present upon an avoidance by cession. Though little appears in our books of this prerogative before queen *Elizabeth's* time, that I presume happened because the pope claimed it in disherison and usurpation upon the crown, being an avoidance by the ecclesiastical law of the kingdom; yet I take it as a settled resolution and maxim of the law, that constant and continued usage and practice for more * than one hundred years, is more than a good warrant to conclude that the law is so. And this argument will not be shaken by saying it is once out of the prerogative, for which no reason can be given, for the king's prerogative is part of the law of the kingdom, and the law is the judge and measure of right and wrong: and *Stamford* in his *Treatise of the Prerogative* says, that the statute of *prerogativa regis* doth but confirm and declare that which was the common law before. But let me demand of him who makes his objection, what
reason

reason there is to be given for collateral warranties; yet that is law, though a natural reason cannot be found out to maintain it; and yet I take it to be a good reason, that in this case the presentation upon this avoidance is given to the king as supreme ordinary by the ecclesiastical law: we are, I hope, better sons of the church, than to think the constitution of our church void of all reason. But I do but weaken this prerogative which has been so long settled, by saying so much, as if it wanted arguments to support it; and I had not mentioned it, had not the gentlemen that argued last for the defendant given occasion for it; for though they pretended they would not undertake to argue it, it having been before settled in the other case, they seemed to rack their inventions for arguments to overthrow it. The king then having this prerogative to present upon an avoidance by cession, I think he is not debarred of it by this dispensation; which I did not observe, that the gentlemen who argued, did admit; and therefore I shall speak but shortly to it. He is not barred either by the dispensation, nor the act of parliament that impowers it, nor the king's confirmation pursuant to the act of 25 Hen. 8. For the king, by his confirmation of the archbishop's dispensation, transfers not any right of his to the incumbent, but barely continues his possession in the living, which would otherwise have been void by the consecration; and when the dispensation determined, it is as if it had never been, and then the avoidance is made, and the king's prerogative is to take place; the avoidance for that time being only suspended by the dispensation which had not been of force without the king's confirmation. But had the incumbent died or resigned during the continuance of the dispensation, he being compleat incumbent for that time, the church had voided by death or resignation, and their majesties could not have presented to it; and this appears by *Parkburp's case*, Dyer 228. b. and 233. a. and 2 *Rolls Abr.* 344. Then * the king having this prerogative, and being no ways debarred by this dispensation and confirmation, I think he is not prejudiced neither by this private act of parliament; for I think this no ways alters the case, or takes from the king's prerogative; for it is plain upon the whole face of the act, that what the parliament designed by it was to erect a new parish church, which being to be taken out of another parish at that time full of an incumbent, might not be prejudiced by this division, and the patronage of this new church for the future settled. In order to the filling it after every ordinary avoidance, it enacts that *Dr. Tennison*, whom the act takes notice of, to be the present incumbent of *St. Martin's*, out of which this of *St. James's* is carved, should be the first rector of this new parish, and then vests the patronage in *the bishop* and my *Lord Fermyn*, by turns, to wit, the first turn of the next avoidance to *the bishop*, and the second to my lord, and then two to *the bishop*, and one to my lord for ever. So that to make a rectory presentative, and settle the advowson of it, and not to injure the present incumbent, out of whose parish the new one is taken, is all that the act indeed intended; and it will be a strange construction of the act, that it vesting the advowson in *the bishop* and my *Lord Fermyn*, and giving the next avoidance to *the bishop*, those words "the next avoidance" should

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Lit. Rep. 212.
Plowd. 205.
11 Mod. 161.
4 Bac. Abr. 648.

exclude the king's prerogative, which the makers of the act never intended to meddle with. For where the king claims a thing, with respect to his royal public capacity, there I think it as a certain rule of law, that general words in an act of parliament without naming him, will not bind him, so is 7 Co. 32. and so many cases cited in *Magd. Coll. case*, and *Plowd. Com.* 240. And that this being newly made a rectory presentative, by this act of parliament, will not exempt it from the king's prerogative is plain; for where there is a cession of a rectory presentative, the king is to have his prerogative; and be it old or new that makes no difference. And therefore, it has been resolved, that the wardship of the heir of *cestuy que use* being given by the statute of 4 Hen. 7. c. 17. if after that statute *cestuy que use* himself make a feoffment to the heir, and die, the heir within age, by force of the statute of *Marlbridge* made two hundred years before, he shall be in ward. And many other cases upon the like reason there are in *Vernon's case*, 4 Co. 4. and *Plowd. Com.* 127. *Bulkley's case*. To make this a donative till the avoidance of *Dr. Tennison*, I must confess it is a very great strain of wit, it being to expound an act of parliament quite contrary to the intent of the makers, * which by every clause of the act seems to be, to make it a parish church of itself, to continue the present incumbent, and to settle the patronage. And constructions of statutes are to be made of the whole acts, according to the intent of the makers, and so sometimes are to be expounded against the letter, to preserve the intent, 3 Co. 59. b. and *Jones* 105. But I think no case can be put in law, where an act has been expounded contrary to the letter, to overthrow the intention. And it is plainly a fallacy to say *Dr. Tennison* came in by donation of the parliament to this rectory, and thence to infer, that it is a donative, and not a rectory presentative, till it is made so by the bishop's presentation. For be it admitted, that *Dr. Tennison* came in by donation (though it may as properly, if not more, be called a presentation by the parliament who erected the living, than a donative, which is without formal institution and induction, the bishop being a party, and his consent, and all acts of jurisdiction being included in it) but, suppose I say he should come in by donation, how comes it to be a donative in him, and presentative afterwards? The parliament, it is plain, gave *Dr. Tennison* no right that he had not before; but having divided the parish of which he was incumbent, confirmed him in the possession of what he had before, by making this a new rectory, and this act immediately upon the passing of it, having made it presentative, can it cease to be so till the bishop present? or can the words of this act give away the king's prerogative right, if it happen in the next turn, which could not be foreseen upon the making of the act; that was only to settle the ordinary course of presentation, and not to meddle with the king's prerogative, which was but an accidental thing. Many acts of parliament have received particular interpretations, to avoid a particular prejudice, 4 *Inst.* 33. 3 Co. 59. But no case can be shewn where the words of an act of parliament have been enlarged, to make a construction to bar or overthrow that which the makers never thought of or intended to meddle with. And should I admit of (which

(which I deny) that the words of this act are as forcible as if the king were patron, and had made a grant of the next avoidance, and so he should be bound by them, yet in that case which was boasted at the bar to be a singular case, and unanswerable, I think the king would not be prevented of his prerogative, for by such a grant nothing past but the right he had to the next turn, as ordinary patron, not any thing of his prerogative right; for an estate that the king hath in any thing which comes to him by such means as others come to them by * is one estate, and an estate that comes to him by prerogative is another estate, and they have distinct considerations and operations in law, *Plowd. Com.* 333. *Rolls Abr.* 195. 1 *Co.* 46. But I take it, that case though the law is plain, yet is not the king's case here; but this is rather as if the king were seised in fee, and when the church is full, he grants away the patronage, and long after the grant the incumbent is made a bishop, and so the living void: would any say that this grant in fee would include his prerogative right? That can never be intended; for at the time of the grant it could not be foreseen, and therefore it cannot be included in the grant so, nor will it in the case of a grant of the next avoidance. I take it, the books are plain, that they are two distinct estates. Therefore the act having made this a rectory presentative, which becomes void by cession, the king's prerogative operates upon it; and not having satisfied the prerogative turn by the *commendam*, nor barred by the confirmation, or this act of parliament, their majesties have a good right to present to this living, and therefore judgment ought to be given for them against *the Bishop and Dr. Birch.*

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The Seventh of William and Mary,

IN

THE KING'S BENCH.

Monday, 19th November, 1694.

Sir JOHN HOLT, *Knt. Chief Justice.*

Sir WILLIAM GREGORY, *Knt.*
Sir THOMAS ROKEBY, *Knt.*
Sir SAMUEL EYRE, *Knt.* } *Justices.*

Sir EDWARD WARD, *Knt. Attorney General.*

Sir THOMAS TREVOR, *Knt. Solicitor General.*

The King and Queen *against* the Bishop of London Case 263.
and Peter Birch.

S. EYRE *Justice.* This case between THE KING AND QUEEN, and the *bishop of London*, stands for the resolution of the court. The king and queen, by their attorney general, bring a *quare impedit* against the *bishop of London* and *Dr. Birch*, to permit the king and queen to present a fit person to the rectory of *St. James*, within the liberty of *Westminster*. And this comes on now upon the demurrer of THE ATTORNEY GENERAL to the plea of *Dr. Birch*. The attorney general in the declaration sets forth, that by an act of parliament made 1 Jac. 2. c. 22. a precinct of ground therein expressed, and which formerly was part of the parish of *St. Martin in the Fields*, should from henceforth for ever after be a distinct parish as it is now, to be called the parish of *St. James*, within the liberty of *Westminster*, independent upon the parish of *St. Martin*; that the church situated within that precinct should be the parish church; that there should be a

S. C. Ante,
413. 441.

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rector * who should have *curam animarum* of the inhabitants of that parish; that there should be a perpetual succession of rectors there; that *Dr. Tennison*, the then present vicar of the parish of *St. Martin*, should be the first rector of this new parish; and that *Dr. Tennison* and his successors, rectors of that new parish, shall be incorporate, and have a corporate capacity and a succession by the name of rector of the parish of *St. James*, within the liberty of *Westminster*, and to have cure of souls; that the patronage, advowson, or presentation of this parish and rectory after the decease of the first rector, or the next avoidance, should belong to and be vested in the *bishop of London* for the time being, and his successors, and *Thomas Lord Jermy*n and his heirs for ever, by such turns as in the act is expressed, that is, that after the avoidance of *Dr. Tennison's* incumbency, the rector shall be presented or collated by the *bishop of London* for the time being, the next by my *Lord Jermy*n or his heirs; then the two next turns by the *bishop* and his successors; the next one turn by my *Lord Jermy*n or his heirs, and so to continue in that manner for ever. He sets forth further, that by virtue of this act of parliament *Dr. Tennison* was rector of this new parish, and parson imparsonce of that church, and was afterwards consecrated *bishop of Lincoln*, whereby the living voided; that it belongs to the king and queen by reason of their royal prerogative to present a fit person to that church so voided; and that the *bishop of London* and *Dr. Birch* hindered them, &c. To this *Dr. Birch* comes in and pleads, that he is parson imparsonce of the church by collation of the *bishop of London*; he confesses the act of parliament, and that *Dr. Tennison* was rector there; and sets forth further, that *Dr. Tennison* was duly created and consecrated *bishop of Lincoln*, and that thereby the church became void; and that thereupon the *bishop of London* did collate him clerk, and he was parson imparsonce of the church before the writ; *et hoc paratus est verificare*. THE ATTORNEY GENERAL hereupon demurs.

And I AM OF OPINION in this case, that the plea of *Dr. Birch* is not sufficient; but that the KING and QUEEN ought to present to this church, and that judgment ought to be given for the KING and QUEEN accordingly.

THIS CASE has been argued twice at the bar on each side; and it seems to me, that those who have argued on the part of the defendants, have made two points in this case.

THE FIRST is, whether or no the king's prerogative of presenting to a rectory void thus by cession, and the promotion of the incumbent * shall operate and take effect upon this new rectory.

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THE SECOND POINT that is made is, whether or no this rectory is *presentative*, or at least was so in the time of *Dr. Tennison*; for they would have it be, that at least during this time it was a *donative*; and that it was never heard that the king presented to a *donative* upon his promotion of the incumbent.

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AS TO THE FIRST POINT about *the prerogative*. For I shall say nothing upon the point of the *commendam*, neither have I opened it because the counsel for the defendant waived it (it was a point adjudged in *Dr. Lancaster's case*. (a) Upon arguing this case the first time the counsel for the defendants owned the prerogative in general to present to a benefice upon the promotion of the incumbent to a bishoprick, but they would have it that it should not extend to this new rectory. But upon the second argument it seemed to be suggested, that this prerogative of the king's was a new thing in general, and that *Wright's case* in *Moor* (b) was grounded upon late precedents. Now that point has been so often adjudged, that I shall not take any pains about it; but something I shall say, and that shall be short; that I think that matter was sufficiently settled in *Wright's case*, and upon great consideration; for the book says, that the point was adjudged upon many books, as well as precedents cited, vouched, and perused. Many evidences are lost by time: but if *the bishop of Ely* spoke truth (which I doubt not at all he did) as it is reported in *Bro. Abr. tit. "Presentation al Eglise,"* 12. 61. the king had such a prerogative in *Edward the third's* time, and did present by virtue of this prerogative; and certainly there ought not to be any doubt of that point at this time of day.

But as to the question, whether or no this prerogative should take effect upon this newly created rectory. My LORD COKE in the case of *Magdalen College*, (c) tell us, that in any construction of acts of parliament, the original intent and meaning of the makers of the law is to be observed: and that will appear in this case by the whole purview of this act of parliament, whereby it is obvious to collect that there was no other intention in it, but to make part of the parish of *St. Martin* a parish of itself, it being of too large an extent to be taken care of by one parson, and that therefore this parish should be a distinct church, and consequently subject to the king's * prerogative as well as any other rectories whatsoever that are presented to. IT IS ENACTED that the precinct of ground therein mentioned, which was part of the parish of *St. Martin*, should be thenceforth a distinct parish of itself; that it should be called the parish of *St. James* within the liberty of *Westminster*; that the church and church-yard already set out, should serve for those purposes; that there should be a rector there, who should have *curam animarum*, and perpetual succession; that the rector should have the house in the church-yard to live in; and it settles the patronage. These are all the particulars of this act of parliament. But there are no words, nor any matter in the act of parliament, which do any way import an intent that the king should not have the same right of presenting upon the promotion of a bishop, as he has in other cases and parishes. Perhaps, if the king had any interest upon the soil, upon which the church-yard stands, and it had so appeared, or had any interest in the parish church of *St. Martin*, out of which this new parish church was taken, the act of parliament might have bound such the king's

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(a) See ante, page 441.

(c) 11 Co. 74.

(b) Moor 299.

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right. But as to any right the king has by reason of his prerogative upon this accident of his promoting the incumbent, there is not one word of that in the whole act of parliament, nor any thing like it. We have a rule in law, that the king is not bound by an act of parliament unless he be particularly named, for the law gives him that prerogative, for the dignity of his person, that he shall not be by construction of law included in common words, much less where his prerogatives are concerned. There are many cases to this purpose, and I shall instance but in one, the reason whereof seems to come close to the reason of this case, and that is the case upon the statute of 24 Hen. 8. c. 12. of dispensations; and the name of this case is *Armiger v. Holland*. (d) That statute appoints that dispensations should be granted by the archbishop, and confirmed under the great seal; and there are in that statute negative words, that they shall not be granted in any other manner. There they did adjudge that this statute only transferred to the archbishop the authorities THE POPE had; but the prerogative which the king had at common law to grant such dispensations, were not taken away by that act, nor could he be restrained unless expressly named. And so is the opinion of my Lord Hobart 146. in the case of *Colt v. Glover*; and there are several cases cited there likewise, upon other statutes to the same effect. Now the case before us is a much stronger case, for here are no negative words in this act of parliament. It is well said in *Wright's case*, that the judges will well advise before they will alter any ancient prerogative in the crown. I do not deny but that there are cases in law, where the king shall be bound by general words in a statute. My Lord Coke (e) brings them all under these heads.—FIRST, Such acts as are to suppress wrong.—SECONDLY, Such as are to take away fraud.—THIRDLY, To prevent the decay of religion. Now certainly this act of parliament was not made upon any such accounts. It could not be made to suppress a wrong, for the thing was not in being, not *in esse* before: here is no pretence of fraud; and as to the decay of religion, this act of parliament is made for the advancement of religion and the professors of it. Here is greater care taken for the souls of the inhabitants, and two church preferments made out of one; and in neither of these things does the king's prerogative interfere at all; for let THE KING or the bishop have a right to present, these ends are equally served. Ay, but say they, here is a wrong done to the bishop, for he loses his collation to the living. If the bishop lose his collation, there is no wrong done, for it is not his right to collate. The law is the true standard of right and wrong. The king's prerogative is part of the law of England, as my Lord Coke says, 2 Inst. 246. And if by the king's prerogative he ought to present in other cases, as our books say he ought, then it is a wrong to the king to deprive him of the presentation. It is not a greater wrong in this case, than the prerogative to present to a church, during the vacancy of the see. The ordinary presentation belongs to the bishop in both cases, but the law in these accidentals gives them to THE KING. And, to say the rectory is

(d) Cro. Eliz. 542. 601. 690. Moor 542. (e) 6 Co. 14.

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the patrimony of the church, I grant it; but is not that satisfied by the incumbent's receiving the profits, who is a member of the church, if he is presented by THE KING as well as by *the bishop*? But, say they then, this is a new rectory, created by this act of parliament. I cannot see any reason why, or how, that should make any difference in the matter at all; that the one is an ancient rectory in the other case, and this is a new one: this a prerogative inherent in the crown, and operates upon all presentative churches, when once they are made so. And this was preceded before, in that new parish of *St. Paul Covent Garden*, * taken out of *St. Giles's*, and erected into a new parish in king *Charles the First's* time. And it was now lately presented to by the king and queen, upon the incumbent *Dr. Patrick's* being made a bishop. I have caused the act of parliament in that case to be looked for, and have perused it, and there is not one word in it to save the king's right any more than there is in this. The reason holds as well in bishopricks newly created by act of parliament. For it may as well be said this is a promotion to a new bishoprick, and therefore the prerogative shall not take place; and yet this prerogative of the king's was never questioned. It has taken place upon the king's presentation, when the incumbent was promoted to a new bishoprick, erected by act of parliament.

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And now I come to THE SECOND POINT that has been made in this case, when this rectory became presentative, at least, whether it was in the time of the new *bishop of Lincoln*. For they that argued for the defendant, would have the incumbency of *Dr. Tennison* to be a donative, and then the king's prerogative could not operate upon the avoidance of a donative. Now for that,

FIRST, I am of opinion that *Dr. Tennison's* incumbency was of a rectory presentative, and this appears by the act of parliament itself, whereby the patronage is settled as well as the parish. It enacts that there shall be a rector, and a perpetual succession of the rector; and then that there shall be a prerogative and right of presentation; then it first appoints *Dr. Tennison* to be the first rector, he being vicar then of *St. Martin's*, and after that the presentation shall be in the bishop and my Lord *Fermyn*, as the act directs; by which it appears that it was to be a rectory presentative; and there are no other words that make it to be otherwise. But say they, *Dr. Tennison* is made the first rector, and then afterwards the patronage and presentation is settled. I answer to that, those words which make *Dr. Tennison* rector, are through necessity, that he might be the first; and yet it does not alter the nature of the patronage. And it would be a very strange absurdity to say, that the makers of this act of parliament did intend to settle a rectory, that should be partly donative, and partly presentative; that would be a very strange construction. As * *Plowden* says in the case of *Astton v. Stubbs*, the sense and reason of the law, is the law, and not the words taken strictly; and it appears by the whole frame of this act, that as this parish was made out of another, so it should be presentative as the church out of which it was taken was presentative. By the pleading it must be understood to be presentative;

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sentative; for it is agreed that the church becomes void by the promotion of the bishop, which could not be, if it had been donative.

And therefore I shall consider the reasons why an incumbency of a church presentative is void, by the promotion of the incumbent to a bishoprick; and I shall consider the nature of a donative, and upon what principles it is founded.

As to THE FIRST, I do not take it to be as has been said, that this is a prerogative avoidance. I take it there is no such thing as a prerogative avoidance; for as it is said in the case of *the king v. the bishop of Winchester*, Cro. Jac. 54. the law gives no privilege to the king to avoid an incumbency; but the church becomes void by reason the bishoprick and the rectory are incompatible in one person. And this is *ratione eminentiæ* by reason of the dignity of the bishop, that he who is advanced to the superintendency of the church, should not be rector in the same church. And so it is said in *Woodley's case*, as it is reported in *Winch.* 98.

THEN as to the nature of a donative, although the exercise and function of it is ecclesiastical and spiritual, yet it is a lay foundation. As it is said 2 Roll. Abr. 343. it is of the foundation and erection of the donor, not by the ordinary, and follows the rules and laws ecclesiastical, as in the case of *Fairchild v. Grayes*, Cro. Jac. 63. reported likewise in *Yel.* 61. It is no way subject to the ecclesiastical jurisdiction, nor any part, nor any order in the church.

Now to apply this. If the church become void, it is by the promotion, as it is agreed by the defendants in this plea; it must be understood to be by reason of the incompatibility for a person to be a bishop and rector of the same church; but the same person might be a bishop, and yet incumbent of a donative. It was never known, as has been said by the defendants counsel, that the king ever presented to a donative, upon making the incumbent a bishop; and I take it, that the reason of that is because a donative makes no figure in the order or æconomy of the church, and so too the bishoprick and a donative are compatible.

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* For these reasons, I am of opinion FIRST of all, that the prerogative of the king shall operate upon this, though a new rectory: and then, SECONDLY, that this rectory is presentative, and therefore the presentation belongs to the king and queen, by their prerogative, and that judgment ought to be given for them accordingly.

* [501]

* A WRIT OF ERROR in parliament was brought by the plaintiffs Henry bishop of London and Peter Birch doctor of divinity, upon a judgment in a *quare impedit* given for their majesties in the court of King's Bench by the uniform opinion of THE WHOLE COURT, for the presentation to the rectory of St. James in the liberty of Westminster, vacant by the promotion of Dr. Tennison to the bishoprick of Lincoln.

x

Dr. Thomas

Dr. Thomas Tennison being lawful vicar of the parish of *St. Martin in the Fields*, one part of the said parish was by act of parliament erected into a distinct parish and rectory, and called by the name of the parish and rectory of *St. James* within the liberty of *Westminster*; and *Dr. Tennison* appointed the first rector there. The same act vests the patronage in the *bishop of London* and his successors, and *THOMAS Lord Jermyn* and his heirs; and then appoints in what order and proportion each of the said patrons shall present; viz. that the first rector after the decease of the said *Dr. Tennison*, or other next avoidance, should be presented or collated by the *bishop of London* for the time being, and the next by the *Lord Jermyn* and his heirs; the two next by the *bishop of London* and his successors, and the next by * the *Lord Jermyn* and his heirs; and the like succession of *two turns* and *one turn*, for all times to come. *Dr. Tennison* was duly elected *bishop of Lincoln*. Before *Dr. Tennison's* consecration, the then *archbishop of Canterbury* granted a dispensation to him in due form of law, to retain and keep the vicarage of *St. Martin*, and the rectory of *St. James*, together with the *bishoprick of Lincoln*, until the first of *July* then next following. This was confirmed by the king and queen, by letters patents under the great seal of *England* (as the statute of 25 *Hen. 8. c. 21.* requires). After which, viz. The said bishop elect was consecrated; but by virtue of the dispensation, and according to the rules of law, the living did not become void at the time of the consecration (as otherwise it would have done); nor did it become void until the first of *July* 1692, at which time it voided by cession: in which case the crown hath an undoubted right to supply it by presentation for that turn, to whomsoever the patronage belongs.

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Anno Dom.
1685. 1 Jac. 2

Ante 413. 441.
493.

* [502]

20 Decemb.
1691.
22 Decemb.
1691.

23 Decemb.
1691.

25 Decemb.
1691.

THIS CAUSE was several times argued at THE BAR, and afterwards solemnly at THE BENCH, and judgment given by THE WHOLE COURT for their majesties.

The matters which have been, and probably may be again stirred against their majesties right in this case, are these,

FIRST, Whether the crown, upon the promotion of the incumbent of a subject's living to a bishoprick, has a right by prerogative to present to that living for the next turn?

SECONDLY, If there be such a prerogative, yet, whether the dispensation and confirmation in this case do not amount to a serving of that turn?

THIRDLY, Whether this act of parliament has made any alteration in this case, to differ it from the crown's presenting upon ordinary vacancies in other livings, upon the promotion of the incumbents?

The TWO FIRST of these points being adjudged with the crown in the case of *St. Martin's* (which was enjoyed accordingly); and there being no difference as to these points between *St. Martin's* and *St. James's*.

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* [503]

The THIRD POINT rising upon the act of parliament was principally and indeed only intended to be considered in the case of *St. James's*; but some of the now plaintiffs counsel stirring the two first points again, the court of King's Bench took them also into consideration, and gave judgment upon all three for their majesties; which was done by * the uniform opinion of THE WHOLE COURT with great clearness.

As to THE FIRST POINT, This prerogative and right of presenting by the crown, upon the promotion of the incumbent of a subject's living to a bishoprick, is an ancient right settled and established by divers solemn judgments in the reigns of king *Henry* the eighth, queen *Elizabeth*, king *James* the first, and downwards; and whenever questioned or doubted, always prevailed; and there is no one judgment or judicial opinion in the law books against it, but many for it. And if so full and particular an exercise of that prerogative do not appear in the old books of the law, as has done in and from the reign of king *Henry* the eighth downwards, it may reasonably be supposed to be occasioned by the unlimited power and usurpation which the popes of *Rome* assumed to themselves in this kingdom, in making bishops, conferring titles to vacant livings, and the like, not only against the prerogative, but even against the statutes of the realm. And if any inferences have at any time been drawn from any thing said in any old book in doubt of such prerogative, the same have been rectified by settled judgments in courts for many ages past, in times when the learning and integrity of the judges admitted of no dispute. Nor is it any objection against this right of the crown, that it has not been put in execution in some cases anciently where the crown had another title, by reason of wardship, or of the temporalities of a bishoprick being in the king's hands; for beside what is said before as to the pope's claims and usurpations, the crown, without prejudice to the prerogative, might make use of that other title not claimed by the pope, upon which to bring *quare impedit* (wherein one single title must be relied on) rather than to make use of that which the pope then challenged and usurped, it being improper for the king to set up his own prerogative against himself, when he had another title in him by way of interest. And it seems a strange attempt after so many ages, and such settled judicial determinations, to question that point of prerogative, whereunto (till this case) an entire submission has been made, and many eminent clergymen of the church of *England* have enjoyed, and some now do hold livings under the title of that prerogative; and it appears by some books of presentations to livings, in and since the reign of queen *Elizabeth*, still extant (the former being lost or destroyed) that the crown has presented several hundreds of times upon such promotions, and enjoyment were had accordingly.

* [504]

* As to THE SECOND POINT about the dispensation; that can in no sort be any objection to the right of the crown; for this dispensation being granted to the incumbent to retain his living, is not in judgment of law any *commendam*, but coming before the consecration was lawful

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lawful and effectual; and the now plaintiffs by their pleadings in the cause, have owned and admitted it to be so; and then thereby the avoidance was suspended, and no vacancy happened by the consecration, nor till the dispensation expired, which was the first of July 1692. So that to affirm this dispensation, or confirmation, did serve or execute the king's turn, is to say the king used his turn before he had it, or filled a vacancy before it was, and that not by his own, but by the act or instrument of the archbishop; the confirmation (which is the king's act) being barely a formality required by the statute of *Hen. 8. c.* to the dispensation of the archbishop.

As to THE THIRD POINT upon the act of parliament, there have been two things objected by the now plaintiff's council.—FIRST, That *St. James* is a new rectory created by act of parliament, and that *Dr. Tennison* came not into it by presentation, but donation; and that the prerogative operates only upon presentative livings.—SECONDLY, That by the express words of the act it is provided, that the first rector, after the decease of *Dr. Tennison*, or next avoidance, shall be presented or collated by the *bishop of London*. As to THE FIRST; there is no doubt but that *St. James's* is by the act made a presentative rectory, participating of the nature of other presentative livings, and *Dr. Tennison* was continued in his former cure, though under another name: and there is no reason in law to make it a donative, or otherwise than of the nature of a presentative living in *Dr. Tennison*, nor for a distinction between old and new rectories; but the right of the prerogative being founded upon the promotion of the incumbent that holds equally both in old and new rectories where such promotion happens to be, and when this new rectory voided by promotion, then, and not till then, the crown's prerogative to present arose, as much as it would or could have done in the case of an old presentative living. As * to THE SECOND; there can be no reason to think the act intended to take away the prerogative of the crown, which, generally speaking, is not bound, unless specially named; but the end of this act was to erect a new parish and rectory; and to make them of the same nature with other parishes and rectories; and to settle the rights of each as between the patrons and parishioners; but in no sort to meddle with, much less to take away the rights of the crown; nor was there any need of a saving of the king's right which arose by the act by making the rectory presentative. And it is not of any weight to say the express words are for *the bishop's* presenting; the intent of the act is satisfied by settling the ordinary course of presentations, without excluding the prerogative, and *the bishop* must take his right subject to the rules of law, one part of which is the prerogative; and it hath been resolved that the grantee of the next presentation must give way to the prerogative, though he lose his turn by it: and if this act should be taken literally, then there would be no right to present by lapse, nor presentation by the crown, in case of any forfeiture, or of the temporalities being in the king's hands, which would be absurd to maintain; and such a literal construction is against the rules and reason of law, and many judicial determinations in the like cases.

* [505]

WHEREFORE it is prayed the judgment may be affirmed. (f)

(f) The judgment was affirmed accordingly, S. G. Shower's Cases in Parl. 185.

Easter



* Easter Term;

* [506]

The Fifth of William and Mary,

I N

T H E K I N G ' s B E N C H .

Saturday, the 13th May, 1693.

Harcourt against Fox.

Case 264.

LEVINS Serjeant, May it please your lordship, *Simon Harcourt* is plaintiff, and *John Fox* is defendant. This is in an *assumpsit* for forty shillings, had and received by the defendant for the plaintiff's use. Upon *non assumpsit* pleaded, the jury find a special verdict — FIRST they find the statute of 37 Hen. 8. c. 1. And that statute doth recite, that the Lord Chancellor before then had had the nomination of the *custos rotulorum*, and the *custos* had the appointment of the clerk of the peace; and then takes notice, that of late several persons had been made *custodes* and clerks of the peace for lives; whereby great misdemeanours had been; and for reformation of them, it enacts, that none be made *custos*, but by a bill under the king's hand, and he should remain *custos* till the king by another bill under his hand appoints another person to be *custos*; and that every *custos rotulorum* do appoint the clerk of the peace who is to hold the * office so long as the other should continue *custos*, so as he demean himself well in the office. — SECONDLY, They find the statute of the 1 William and Mary, c. 21. which appoints, that the *custos* shall be made according to the appointment in the statute of 37 Hen. 8. c. 1. which had been altered by a statute made in the reign of Edward the sixth, which I shall have occasion to open by and by. And it further enacts, that the *custos rotulorum* shall appoint a person to be clerk of the peace to execute the same by himself or his sufficient deputy, and to take and receive the fees and profits for so long time only as he shall well demean himself in his said office. Then the next clause is, that if any clerk of the peace do misdemean himself in the office,

Indebitatus assumpsit lies by a clerk of the peace appointed pursuant to 1 Will. and Mary c. 21. for fees and perquisites of office received by a person appointed to the office by a succeeding *custos rotulorum*, for the appointment being *quamdix bene se gesserit*, is not void by the removal of the *custos*.

S. C. Ante, 426.
S. C. Post, 516, 556.
Id. Ray. 161.
853. 1245.

* [507]

upon

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upon complaint in writing to the justices at the quarter sessions, they may remove or suspend him, and then the *custos* shall nominate another, but if he neglect to nominate before the next quarter sessions, the justices of the peace at that quarter sessions shall appoint one to hold the office and execute the same by himself or deputy, and to receive the fees and profits: here indeed it is not said how long he shall hold it, but it is added by way of "PROVISO, that he shall be liable to all the penalties, forfeitures, conditions, limitations, and provisions therein and thereby mentioned and expressed, and be removed or discharged by the justices in manner above-specified." THEN there is another clause in the new statute which enacts, that the *custos*, or any other person to whom it belongs to appoint a clerk of the peace, shall not sell the place, or take any bond or assurance to receive any reward, money, fee, or profit, directly or indirectly to him, or any other, for such appointment, upon pain that both the buyer and the seller shall be disabled to hold their places, and shall forfeit the double value of the things given or taken. Then comes the last clause; "that every clerk of the peace before he enter upon the execution of the office, shall in open sessions swear that he has not, nor will pay any money or reward, or give any bond or assurance to pay money, fee, or profit, directly or indirectly to any person or persons whomsoever for such nomination or appointment." Then the jury find further, that on the 9th of July in the first year of William and Mary, my Lord of Clare was made *custos rotulorum* for the county of Middlesex, and he appointed Mr. Harcourt the plaintiff clerk of the peace, and they find the patent in *hæc verba*, whereby he is appointed to be clerk of the peace for so long time as he shall well demean himself in the office. And * then they find, that afterwards in the third year of William and Mary, my Lord of Clare is removed from the place of *custos*, and my Lord of Bedford is made *custos*, and he makes the defendant Mr. Fox clerk of the peace, with a limitation in the words of 37 Hen. 8. c. 1. to continue clerk of the peace so long time as my Lord of Bedford should continue *custos rotulorum*, he demeaning himself well in the said office. They find likewise, that this clerk of the peace thus put in by my Lord of Bedford, hath received money as fees for the office, for which the clerk of the peace put in by my Lord of Clare hath brought his action; but which of them is really clerk of the peace the jury are doubtful, and submit it to the judgment of the court: and if the law be for the plaintiff, they find for the plaintiff; if the law be for the defendant, they find for the defendant. MY LORD, the cause upon this verdict is shortly but this. The Earl of Clare is put into the office of *custos rotulorum* since the statute of 1 Will. and Mary, c. 21. he puts in the plaintiff to be clerk of the peace in the words of that statute: my Lord of Clare is removed, and my Lord of Bedford is made *custos rotulorum*, and he puts in the defendant to be clerk of the peace in the words of the statute of 37 Hen. 8. c. 1. and the question in the case is, whether of these two be clerk of the peace at the time of the defendant's receiving the fees of the office. And with submission I conceive the plaintiff was then, and still is clerk of the peace by virtue

virtue of the constitution and appointment of my *Lord of Clare*: but however the defendant is not, if the plaintiff should not be, for he is not put in according to the limitation in this last law. MY LORD, there was a statute that came between these two mentioned in this special verdict, and which in short was the occasion of making this last statute, and that is 3 & 4 *Edw. 6. c. 1.* which recites the statute of 37 *Hen. 8. c. 1.* and the inconveniencies that arose thereupon for want of a *custos* many times, because they could not come immediately to get the king's hand to the bill, and therefore it doth appoint the *custos* should be made by the chancellor or keeper, as it was before this statute of 37 *Hen. 8. c. 1.* Now this statute of *William and Mary* doth restore the statute of 37 *Hen. 8. c. 1.* as to the *custos rotulorum* to be appointed by the king by bill to continue till the king appoint another by bill. But * MY LORD, as to the clerk of the peace, that statute of 3 & 4 *Edw. 6. c. 1.* said nothing, but appointed only the manner of making the *custos*; and the clerk of the peace, as to his office, it stood as it was before. Now this last statute appointing that the *custos* shall be made according to the method prescribed in the statute of 37 *Hen. 8. c. 1.* therefore I do humbly conceive, the defendant would infer from hence, that because the *custos rotulorum* was to be made according to the statute of 37 *Hen. 8. c. 1.* the clerk of the peace must be made according to the statute too, and thence I do imagine the difference between the plaintiff and defendant doth arise. But with submission to your lordship, I conceive this inference can be drawn neither from the words, nor from the meaning of the statute of the first of this king and queen; for though it did intend, that the *custos rotulorum* should be made and continue as he was before the statute of *Edward the sixth*. Yet I think it is plain it did not intend that the clerk of the peace should continue as he was by the statute of *Henry the eighth*. But I rather take it, that this is a new law as to this office of clerk of the peace to new mould the office, and make it different from what it was before this new act. MY LORD, I conceive that what they would have, cannot be inferred from the words of the statute; for the words are, that the *custos rotulorum* shall be made according as is directed by the statute in the 37 *Hen. 8. c. 1.* and if it had gone no further, what had that been as to the clerk of the peace? They might then have had more ground to infer, that the clerk of the peace should continue as he was before, if this statute had said no more, though perhaps it might have been somewhat difficult to have made such an exposition since the statute had restored the one officer, but not mentioned the other. Truly I cannot tell what exposition might have been, but here I am sure there can be none such; for when it comes to declare the right of nomination of the clerk of the peace to be in the *custos*, it plainly says the clerk shall be made in another manner, than he was to be made by 37 *Hen. 8. c. 1.* for the words of the limitation are otherwise in this statute than in that. The statute of 37 *Hen. 8. c. 1.* says, he shall be clerk so long as the *custos* shall continue in his office, demeaning himself well; but the words of this statute are, that the *custos* shall make the clerk of the peace

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to execute the office so long as he shall demean himself well in the office. It does not say as long as he continues *custos*, so as he demean himself well, which are the words of the old statute, but simply and absolutely, so long as he well demean himself in the office. Now, * MY LORD, this I take plainly to be an estate for life; for if any judicial or ministerial office be granted to any man to hold, so long as he behaves himself well in the office, that is an estate for life, unless he lose it for misbehaviour. So was *Sir John Waller's case*, (a) as to the office of chief baron of the exchequer; and so was *Justice Archer's case* (b) in the time of king Charles the second. He was made a judge of the Common Pleas *quam diu se bene gesserit*, and though he was displaced as far as they could, yet he continued judge of that court to the time of his death; and his name was used in all the fines and other records of the court: and so it is in all cases of grants from the king, or from any other person. And then with your favour, MY LORD, this statute of William and Mary appointing that the *custos rotularum* shall be made according to the provision of 37 Hen. 8. c. 1. but the clerk of the peace shall remain clerk, as long as he well demeans himself in his office; that is a quite different limitation from that other statute of 37 Hen. 8. c. 1. and the only qualification of his estate in the office, is by the words of this statute, during good behaviour; and that is an estate for life, unless his misbehaviour in his office: and from thence I am sure it cannot be collected, as out of the words of the statute, that he shall be removable by the *custos*, or by the removal of the *custos*, or by any body else, but for misbehaviour. MY LORD, I conceive they will find it as hard to make out any such inference from the intention of this act of parliament, from the words that he shall be removeable any ways but for misdemeanour: I confess it will be hard by an implacit intention to think, that when the statute says he shall continue so long as he demean himself well, which gives him an estate for life, any collateral words should take that estate out of him, and make him to hold his office no longer than the *custos* continues *custos*. But, MY LORD, I take it with submission, from the whole frame of this statute, it is plain the parliament did not intend to restore the statute of 37 Hen. 8. c. 1. in all points, but did intend to new mould this office of the clerk of the peace, in another, and a very different manner, than as it stood by that statute; for if they had intended the other, there had need been done no more than to have repealed the statute of 3 & 4 Edw. 6. c. 1. and then all had been as it was before; but that they have not done: for they have indeed made the *custos rotularum* to be as he was before, by that statute; but the words concerning the clerkship of the peace are quite otherwise than the words in the statute. This * statute of William and Mary differs in many things from both our former statutes.

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FIRST, In the words that have been mentioned how long he

(a)

(b)

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shall remain in his office, so long only as he shall demean himself well in it, that is, simply and absolutely, without dependence upon the *custos*, or upon his removal out of his office. SECONDLY, It differs in the manner of putting him out, that is by complaint to the justices in sessions, and that in writing, and that proved before them; and then they upon the proof may suspend or discharge. Now these circumstances were not necessary before; for if the clerk of the peace had committed a misdemeanor, having but an uncertain interest in his office, he might be removed without complaint in writing; the *custos* might have put him out by word of mouth, as the case is in *Dyer*, 114. b. which I take to be a far stronger case than this; THE LORD CHIEF JUSTICE of the Common Pleas, by the opinion of the whole court, discharged *Vaux* a philizer for misdemeanor in his office, and swore in another; but there was no record of this discharge made upon the roll, nor *Vaux* called to answer, according to law, and there it is resolved a good discharge notwithstanding: and sure the justices of peace might much more easily discharge the clerk of the peace, if he had so uncertain an interest; but now this law requires that the complaint must be in writing, and proved, which argues that they thought he had such an interest in his office, that he was not slightly to be ousted of it. And then, MY LORD, when he is put out, it differs in this too, that the justices of the peace may now appoint a clerk of the peace by this statute, if the *custos* neglect to name one before the next sessions: it is true, it is not said for how long he shall hold the place whom the justices put in, that is not material to our case at present: but I think upon the whole face of the act he should have the same estate in his office, as he had who was put in by the *custos*, because it is said he shall be liable and subject to the same penalties and conditions before-mentioned, and to be removed and discharged in the same manner; and if the *custos* had not named a clerk, and the justices had put in one, the reason of the thing argues he must be in upon the same terms, as if he were put in by the *custos*, upon whose neglect and default he was put in by the justices. Another difference there is in this statute, from both the former; and, which indeed, is a singular difference from other offices in the law, and that is, he must take an oath before he enter upon the office, that he neither hath given or will give any thing for it; this was never incumbent upon the clerk of the peace * before, nor upon any other officer of the law. I know it is true, the statute of *Edward* the sixth, where provision is made against buying and selling of offices relating to administration of justice, puts disability upon him that grants the place, and upon the party that is let in. But this statute does not only do so, but it gives the forfeiture of double what was given and received, which is beyond what any law hath done in this kind before. From all which, my lord, I conclude that it appears that the intention of the parliament was by this act, to new-mould the office, and put it in other circumstances than it was in before; and therefore I take it, my business is to keep close to this statute; and if I should go about to enquire into the original of the other office of *custos rotularum*, I should *ambulare in tenebris*,

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tenebris, that is, I should attempt to do a thing I should be able to make very little of. He has been a very ancient officer, and of considerable power in the country; he keeps the records of the crown in the county, and draws up indictments: this court has taken notice of him as a known officer, and I know this court has fined him for faults in his office; he is an officer known in the law, and a minister of common justice to the nation in the country. And therefore I think, with submission, the parliament's meaning was to settle this office, so that he should not come in by corruption, and that he should have encouragement to demean himself well when he doth come in. The act hath not so carefully provided for the *custos* himself, which they thought honorary and titular, and not so nearly interested in the ministration of justice to the nation, and therefore he may be in and out at the king's pleasure; but they take care that the clerk of the peace, who is a minister of justice, should have a more fixed estate in his office, and have established particular qualifications for him. I cannot say how it was before the statute of 37 Hen. 8. c. 1. but I can say that it was granted for life before that statute; for the statute itself says so, and sets it forth for a grievance, that sure must be that it was granted to unskilful persons for life, or else the mere grant for life is a strange kind of grievance, and it is a grievance if it be one that runs through the whole common law, as to ministerial offices; for all the offices in this court, in the *Chancery*, in the *Exchequer*, in the *Common Pleas*, and generally all over the kingdom relating to the administration of justice, and even the judges themselves are officers for life; and why there should be more of a grievance in this case than in theirs, • I do not see; in general they are all for life, though some few particular ones may be excepted indeed. And, my lord, though I cannot say this place was ever granted anciently so, for they will tell me there was a time when there were no justices of the peace; and this being their clerk, there was a time when there was no clerk of the peace; yet I can tell, that before there were *justices of the peace*, there were *conservators of the peace*, and it is like they had their clerk in their courts to do their business for them, and keep the records, and it is likely this officer was in imitation of that. But I cannot directly tell how things might be, for this matter is all *in nubibus*. But I can say, my lord, if the clerkship of the peace was not granted for life before, I think it had been better it had been so, and will be better now if it be so, and not leave it as an uncertain interest: and I think I am justified in this opinion by the practice of the whole law; for surely the law would not admit that generally the offices of justice should be granted for life, if it had not thought that it was better they should be so, and certainly it is better they should be so, and that too in many respects. FIRST, It is better for the office, for if the party be in for life, he will take more care to collect the best precedents for drawing up indictments and other records for the management of an office wherein he is to spend his whole life. And I conceive it is better for the officer, for he will have the more encouragement to do what belongs to the duty of the office when he knows he has a fixed estate in his office, and

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and that will make him look very carefully to the rights of the office. And I likewise conceive it is better for all the subjects that it should be so; for they may well expect to have justice better done by a man who is bound to it upon the penalty of forfeiting a place that he has for his life, if he behave himself well in it, than by a man who may expect to be turned out every day, or for a slight occasion; for it is all one to him whether he behave himself well or ill in a place he cannot promise himself any enjoyment of, though he behave himself never so well; and so there may be more damage or injury from such an one, than from one that has a fixed estate in his office. With your lordship's favour, I say it is no hurt to any body that it should be an office for life, for it has an annexed condition to be forfeited upon misdemeanour, and this has been a condition and provision annexed by the law to all offices, they being trusts, and misdemeanours in the office is a breach of trust. And truly I think it is worse for no body, but for those that have the placing and displacing at their pleasure; because they cannot bind them to such observance and obedience to them, as if they had a power to turn them out if they would not do what they might have a mind to have them do; it is injurious in no other respect whatsoever; and I think that will not be thought a public mischief. I conceive this might be some reason for the making this new act; for the parliament might observe that some years before there had been great changing of offices that usually were for life into offices *quamdiu placuerit*; this is very well known in *Westminster Hall*; and I did know some of them myself, particularly the judges of the courts of common law, for I myself (among others) lost my judge's place by it, and this might be the reason why the parliament put this oath upon the clerk of the peace, "that neither directly or indirectly he had given, or would have given anything for the place." It is possible they might take notice that the usual way was to apply to the secretary in chancery for clerkships of the peace, and when the bargain was made that such an one should be clerk of the peace, giving such a gratuity, then such a one was to be made *custos*, as would make this man clerk of the peace; and so the *custodes rotulorum* were changed many times, and at one time altogether, when such application was made, so that in effect the clerk first made the *custos*, and then the *custos* the clerk; for the clerk gave the secretary a gratuity, and then he was to be clerk, and such a one made *custos* as would make him clerk. I apprehend this may be taken notice of by the parliament, it being so much in use before, and therefore is there so strict an oath imposed upon this office as never was before, nor is now upon any other office. MY LORD, if the parliament had such thoughts as these are, which should be the reasons of new moulding this office as I conceive this act does, then I cannot apprehend that they would intend to make him removeable at will, but give him so fixed an estate in his office, as should encourage him to behave himself well in it. So that, since neither the words of this act, nor the intent of it are sufficient grounds for inferring the clerk's being removeable for any thing but misdemeanour, I humbly hope your lordship will think he is not so. MY LORD, as for the defendant

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Mr. Fox, I conceive, as I said, that he is not clerk of the peace, for the statute of *William and Mary* says "he shall execute the office, and" take the fees for so long time only as he shall behave himself well "in it;" but * the defendant is made clerk according to the words of the statute of *Henry* the eighth, which are quite otherwise than those of this statute; and this being the last law is to take place: so that I think he is not made clerk of the peace at all, and so not intitled to the fees of the office; but the plaintiff is clerk of the peace, and has a right to the fees: and therefore I pray your judgment for him.

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* On this day, Friday, 30 June, 1693, THE COURT delivered their opinions in this cause *seriatim*.

Trinity Term,
5 Will. & Mary.

S. C. Ante, 426.
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EYRES *Justice*. This is an *indebitatus assumpsit* for forty shillings. Upon *non assumpsit* pleaded, the jury find a special verdict. They find the act of 37 Hen. 8. c. 1. and several clauses of it concerning the *custos rotulorum*, and clerk of the peace; and they also find that the act of the first of this king and queen about the commissioners for the great seal, and several clauses of that act, relating also to those offices of *custos rotulorum*, and clerk of the peace. Then they find that after the making that last act, the *Earl of Clare* was duly constituted *custos rotulorum* of the county of *Middlesex*, and afterwards he did by writing under his hand and seal, which the jury find in *hæc verba*, appoint the plaintiff to be clerk of the peace for the county, to hold and execute that office by himself, or his sufficient deputy, for so long time as the plaintiff should well demean himself therein; and they likewise find that the plaintiff at the time when he was named to this office, was a person resident within the county, and capable of the place; and afterwards * at a sessions held for the county, the plaintiff was duly admitted to the office, and duly exercised the same. They further find, that on the 5th of February, in the third year of this king and queen, the *Earl of Clare* was removed from being *custos rotulorum*, and the *Earl of Bedford* was duly constituted *custos*, and he by writing under his hand and seal, found likewise in *hæc verba*, named and constituted the defendant to be clerk of the peace, to hold and exercise the office during such time as he should remain *custos*, the defendant demeaning himself well therein; and that the defendant afterwards, at a quarter sessions for this county was duly admitted into the office, and during the time that he had and executed the office, did receive fees belonging to the office of clerk of the peace, to the value of five shillings; and if upon the whole matter the court does adjudge the defendant did assume upon himself to pay this money, they find for the plaintiff; if otherwise, they find for the defendant. And upon this special verdict I am of opinion judgment ought to be given for the plaintiff.—I shall not ground myself in giving this judgment upon that which was much insisted upon at the bar, that it was plain within this special verdict, that however it happened as to the plaintiff, the defendant could have no title to this office, because his appointment does not pursue the words of that last act, it being only for

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"for so long time as the *Earl of Bedford* remained *custos*;" for I take it, the plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's title; but withal I am of opinion, that notwithstanding that limitation in the defendant's grant, if the plaintiff was not still clerk of the peace, the defendant would be clerk of the peace within this act of parliament; for I take it, the *custos rotulorum* has only a power to nominate, and when once the clerk is in his estate in the office, he is settled by the statute, and not by the limitation in the grant; and it is like the case in *Dyer* 153. b. The case of the register of the admiralty which was granted to two, and the longer liver of them; whereas the custom alledged was of a single person, and there it was much insisted upon that this was an ill limitation, and that should avoid the grant; but it was held otherwise, and that the interest is by the custom, and not by the limitation; and so there it is plain, though it be an ill limitation and nomination that would not avoid the defendant's title to the office, he being in by the statute, and the *custos* having nothing but the nomination thereof, that objection, I think has nothing in it. But * that which I found my judgment upon is, that the plaintiff does continue still clerk of the peace, notwithstanding that the *Earl of Clare* is removed from being *custos rotulorum*. We are, I must confess, much in the dark as to the beginning of the office of clerk of the peace, and as to what estate and term he had in the office anciently; that no where appears further than what may be collected out of the preamble of the statute of 37 Hen. 8. c. 1. which does recite "that till then, of late, the *custos rotulorum* had the nomination of clerk of the peace, as the chancellor or keeper had of the *custos*," and that several unlearned men had then for several late years, got "grants of this office for their lives," which being recited there to be mischievous, to reform it, IT IS ENACTED "that the *custos* shall be appointed by the king, and then he to appoint the clerk of the peace," which clerk of the peace was, by express limitation of that act, to hold the office "for so long time as the other remained *custos*, so as he demeaned himself honestly in the office," "which office," it provides, "the clerk may execute by himself or his deputy, so as that deputy be admitted by the *custos*, and be sufficient to execute the office." By this statute, to remedy the mischiefs complained of in the act, the clerk of the peace is put wholly under the power of the *custos rotulorum*, having his creation from him, and a power to make a deputy by his approbation and his duration with him, being to continue with him in the office so long as the other continued *custos*, behaving himself well, and the words "unless displaced by the *custos*," I take it, are to be interpreted for *misdeemeanour*; which I take it by this act the *custos* might do, and the sessions of the peace had no power to displace him of all; for though they, being the court where he was an officer, might suspend him for *misdeemeanour*, yet they could not deprive him of his office, but he might still continue in the office though suspended from execution; for the words, "so that the said clerk demean himself in the said office justly and honestly" in this act, were added to abridge the estate of the clerk of the peace in his office, and to enlarge the power of the *custos rotulorum*, and to

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give him that created him a power to displace him for misdemeanour, and not to set up a jurisdiction in others. From all which parts of this act so penned, I think it must be obvious to every man's understanding, that this act was but declarative of what was the law before the making of the act; and the chief thing designed in it was, that the office of the clerk of the * peace should be filled and executed by a learned, able, honest person; and the best means to effect this end the parliament thought to be by putting the clerk of the peace wholly under the power of the *custos rotularum* in the several respects that have been mentioned. And matters so standing upon the statute of 37 Hen. 8. c. 1. at the time of the making this last act, which makes the question before us in this case; and the end designed by that statute of 37 Hen. 8. c. 1. not being so well effected by the means therein prescribed, the parliament by this act, intending the same thing, viz. to have the office filled by a person every way fit to discharge the duty of it, designed to procure the performance of this intention by quite different means from those in the former statute, as by taking the clerk of the peace wholly out of the power of the *custos*, save only the nomination and subjecting him when named to another jurisdiction, that is, to the sessions of the peace to which he was properly an attendant. And that this was the intention of the act, appears from the several parts of it, as particularly the *custos rotularum*'s nomination is abridged to a person residing within the county, and care is taken that he shall not be put in for money, and that such estate as he has in the office, shall be only upon good behaviour; which behaviour shall be under the inspection of the court of sessions to which he is an officer, and that for the means of obtaining the ends which they designed, was by putting him wholly under the power of the court of sessions, is plain, by their giving the *custos* the bare nomination, and giving the sessions the power of suspending and discharging, and in giving the clerk of the peace another estate in his office, than that depending upon the *custos*'s estate in his office, which I think will not be denied is done whatsoever estate that proves to be in law, and by giving him a power to make a deputy without the approbation of the *custos*, which he could not do before; for as my LORD COKE says in *Lincoln College case*, (c) "the office of a "good expositor of an act of parliament, is to make construction upon "all the parts together, and not of one part only by itself," and from the several parts of this act taken together, I think it will not be denied but this was the intent of parliament; and this, the remedy, provided they designed to have the clerk of the peace's office well supplied, and it being one branch of this remedy prescribed by the act, that is of taking him out of the power of the *custos*, to wit, the giving him a distinct estate in the office from the office of the *custos*, the words of the act herein are certainly to be construed most favourably to answer the intent of the law makers, and they are to * have the largest construction that they can bear, in order to ad-

(c) 3 Co. 58. 2 And. 31.

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vance that intent. And I do think, that without any strained construction, both by the intent of the law makers and the words of the act, there is plainly given to the clerk of the peace an estate for life in his office determinable upon his good behaviour; for the express words of the act are, "to execute the same by himself, or his sufficient deputy, for so long time only as he shall well demean himself in the office;" which words in lands and tenements, as well as in offices, requisite circumstances and ceremonies being performed, as it is said 3 *Inst.* 42, is an estate for life determinable upon the good behaviour of the party. And truly I take it, the express limitation in this act is an exclusion of the former estate of the clerk of the peace in his office, which was only so long as the *custos* continued in his office according to the rule in law, "*expressio unius est exclusio alterius*:" and this clause in the act is a substantial enacting clause no way relating to the statute of *Henry* the eighth. And as to the clerk of the peace, his estate thereby limited seems to be as it were introductive of a new law; and though the words are penned in the affirmative, yet they do imply a negative, that he shall have this estate in his office, and no other. Whether a subsequent statute affirmative is a repeal of a former statute made concerning the same matter, is a large field to walk in, and no way pertinent to this case; for all those statutes depend upon the penning; and the intent of the makers must be collected out of the words, how far they meant to repeal or confirm; and therefore leaving that consideration, I shall rather betake myself to that which is more pertinent to our purpose; which is, that statutes introductive of a new law penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative; and if this be a new estate in this office created by this act of parliament, as plainly it is, it being different from that which was the former estate by the statute of *Henry* the eighth, I take it, this statute introducing a new law being in the affirmative, does plainly imply a negative. Now that affirmative statutes introductive of a new law, do imply a negative, I rely upon the case of *Withwen v. Baldwin*, 1 *Sid.* 55. and *Plowd. Com.* 113. *b. Townsend's case*; where you may see a great deal of this learning plainly laid down to this purpose. And * if this be not so construed, you may as well say this very clause, "that the *custos* shall name one residing in the county," does not imply a negative, that he shall not name a foreigner; as the clause which creates the clerk's estate in the office, does not imply a negative, that he shall have no other but that. Besides, I think it will not be denied, but that the clerk of the peace that is named by the justices upon default of the *custos* nominating, shall have an estate for life in his office, for then it is introductive unquestionably of a new law, for the justices had no such power before; and in that case, if the words had been, "that he shall execute the office for so long time only as he shall demean himself well in it," who will deny that to have been an estate for life? But though the words are not so, yet I take it, the statute has done the same thing; for when he gives the justices power to nominate in default of a nomination by the *custos*, and says, one so nominated shall have the

11 Co. 61.
4 *Inst.* 43.
Ld. Ray. 160.

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office "under the same limitations and provisos as are before mentioned in this act;" it is plain, there is no limitation in the act, but only that he shall hold it for so long time as he demeans himself well in it: then the proviso being added to the other clause, it is as much as if the limitation had been in that clause. Now, if the parliament did intend that the clerk put in by the justices should have an estate for life in his office, then surely they did not intend the clerk that is put in by the *custos* should have a less or a greater, or other estate than the clerk put in by the justices. Therefore upon this act being thus penned, and thus construed as I take it it ought to be for the reasons that I have mentioned, I do conceive that the plaintiff continues clerk of the peace, notwithstanding the removal of my Lord of Clare from being *custos rotulorum*, and that he is well entitled to receive this five shillings received by the defendant out of the fees of the office: and therefore I think judgment ought to be given for the plaintiff.

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GREGORY *Justice*. This is an action on the case, wherein the jury find a special verdict, which I shall not need to repeat, my BROTHER EYRES having opened it at large. The sole question upon it is, whether * the plaintiff being made clerk of the peace of this county, by the *Earl of Clare* when he was *custos rotulorum*, doth still continue clerk of the peace, notwithstanding the *Earl of Clare* was removed and the *Earl of Bedford* made *custos rotulorum*, who hath named the defendant to be clerk of the peace. And the doubt is, which of these two has the better title to this office. The matter comes in question upon the construction, and comparing together of two statutes; that of the 37 *Hen. 8. c. 1.* concerning the naming of the *custos* and clerk of the peace, and the statute of the first year of this king and queen about enabling the lords commissioners of the great seal, to act as lord chancellor, or lord keeper. I was not in court the last term when this case was argued the second time, therefore I shall not take upon me to answer the objections that were made on either side; but I shall only apply myself to consider what construction is to be made upon the act of the first of this king and queen, and how far it either consists with, or is repugnant to, the former statute. And indeed I do agree with my brother, that the plaintiff has a good title to the office, and ought to recover the fees. FIRST, I do consider what alterations this statute has made from the former statutes; and there I find,—*First*, It does in a sort repeal the statute of 3 & 4 *Edw. 6. c. 1.* which had taken the nomination of the *custos rotulorum* out of the king, as it was settled by 37 *Hen. 8. c. 1.* and placed it in the lord chancellor, or lord keeper. For this act doth appoint, that the *custos rotulorum* should be named, as was ordained by the statute of 37 *Hen. 8. c. 1.* and so the nomination comes to the king again. *Secondly*, I take it, this act doth abridge the power of the *custos*, as to the naming of the clerk of the peace in that particular, which is not in the other statute, that whereas before the *custos* might have named any man, let him live where he would, to be clerk of the peace; and the common practice was, that, neither before nor after the

the nomination, the party named was resident in the county, but the county business was all transacted by a deputy. Now it is enacted, "that the *custos rotulorum* shall appoint one resident in the "county," and cannot name a foreigner resident in another county. Thirdly, * It doth abridge the power of the *custos*, as to the determination of the clerk of the peace's office: for whereas before he was removeable for misdemeanour by the *custos*, now that power is transferred to the justices of the peace at their quarter sessions: nay, if, after he is removed by the sessions, the *custos* does not at the next sessions nominate one to be clerk of the peace, it takes, for that turn, the power from him of naming a clerk, and transfers it to the quarter sessions, who have power to make one for him. So that although the *custos* be to be named, according as is appointed in the statute of 37 Hen. 8. c. 1. yet he is not to exercise the same power which that statute gave him. For the great question now is, what alteration this latter statute has made, in relation to the clerk of the peace and his office? And in that point whether the statute of 37 Hen. 8. c. 1. and this of the first of this king and queen, are consistent together; and I take it they are not. For the statute of 37 Hen. 8. c. 1. doth give the clerk of the peace but an estate at will in this office. I do not mean at the will of the *custos*, but at the king's will and pleasure, for that statute says expressly he shall continue clerk, as long as the *custos* continues *custos*; so that though he was not removeable by the *custos rotulorum* at his will, yet, if the king named a new *custos rotulorum*, the clerk of the peace was determined, and the addition of those words "if he shall so long well demean himself in the office" signify nothing, because they are annexed to an estate that was originally but at will. But now I take the statute of the first of this king and queen to be a new law, as to this particular, and that it relates not to the former act; for I conceive that by this act the clerk of the peace has his office for his life, by these words, "to have and enjoy so long as he shall well demean himself in the office." If these words had been annexed to a grant of any other office in *Westminster Hall*, without all question the grantee had been an officer for life. (d) And I do not see but that the clerk of the peace being an officer relating to the execution of the law, his office must be governed by those rules that govern other officers of like nature. In the year book, 2 Hen. 7. pl. 1. he is called not only *clericus pacis*, but *attornatus domini regis*, and that is a proper office for him, for he draws the issues upon traverses, and so was as *attorney* in that court for the king. When once the *custos* has named him, he has no further power by this act over him, but he is in by virtue of the statute; and * I take it, he is not removeable by the death, or removal of the *custos rotulorum*, any more than any other officer here in *Westminster Hall* is upon the death or removal of the judge that placed him in; for being once in his office, the law settles him there. And for this word "only" viz. "that he shall hold the office so long only as he

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(d) Co. Lit. 42. 2 Roll Abr. 844. Show. P. C. 161. 4 Mod. 173. 2 Bac. Abr. 671.

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"well demeans himself in the office," I cannot think that in that place it signifies any thing more properly than to be determining of what estate the clerk should have in his office, that he should be removable upon no other cause. The word "only" in another office would not have made any alteration as to the law, and I cannot conceive why it should in this. If the meaning of the law makers had been otherwise, they would have referred this clerk of the peace to the order appointed by the statute of 37 Hen. 8. c. 1. as the other was. But this is a distinct enacting clause, having no relation to it at all. And that this should be the meaning of it, seems to me to appear by those subsequent clauses that my brother hath observed. For in the next following clause, which impowers the sessions to remove the clerk for misdemeanour, and to name another in default of the *custos* his nomination, the act says, "that he who is nominated by the justices shall hold and enjoy the office," speaking indefinitely, and that, I take it, would make an estate for life. But the next ensuing clause makes it more clear, that though there be no express limitation in the foregoing clause, yet it saith "he shall be subject to the same limitations, forfeitures and conditions as are before in the act mentioned and expressed." Now there is no limitation of his estate in his office, but that of good behaviour. Therefore, I say, upon the whole matter, I take it, that the plaintiff being named clerk of the peace by the *Earl of Clare*, when he was *custos rotulorum*, had by that an estate for life in his office; and I take it he is well intitled to the fees of the office; and that therefore in this case the plaintiff ought to have his judgment.

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DOLBEN *Justice*. And I am of the same opinion that the plaintiff ought to have his judgment. I do agree that which my BROTHER EYRES offered at first, that the plaintiff must make himself a title, or he can have no judgment; he is not to depend upon the weakness of the defendant's title. * And I think the plaintiff hath a good title to this office; and that, notwithstanding the removal of the *Earl of Clare* from the office of *custos rotulorum*, he yet continues still clerk of the peace of this county. The truth is in this case, it cannot be expected that much should be said; all that is possible to be said, I think, my brothers have spoken already; for it stands upon these two acts of parliament, and if you will take these two acts of parliament into consideration (upon reading of them, and weighing the several parts and clauses in them) I cannot but think any man will agree with me that this is a plain case, and truly I do not find any difficulty at all in it. I did indeed expect the counsel for the defendant in their arguments of this case would have laid some stress upon the word "only;" for if any office be granted to a man to enjoy, so long as he shall behave himself well in it, no one will doubt but the grantee hath an estate for life in the office. Now whether the word "only" doth make any difference in the case is the question; and truly, I must say, I can see none. Whatsoever the meaning of putting in that word was, I cannot tell, nor have heard any thing satisfactorily spoken to it. For if any one hath an office granted to him to hold *quamdiu tantum*
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se bene gesserit, would that make it not to be an estate for life? But the reading of this statute to me, gives me full satisfaction that the law makers intended that the change or death of the *custos rotulorum* should not avoid the office of clerk of the peace: that it did so by the statute of 37 Hen. 8. c. 1. is plain; for there the words are, "he shall be clerk of the peace so long as the other continueth *custos*." Then the question is, whether there be any alteration made by this last statute; and that the statute of 37 Hen. 8. c. 1. was altered as to the *custos* by that of 3 & 4 Edw. 6. c. 1. cannot be disputed, for it was the declared end of that statute. But I think it as plain that it was not altered as to the clerk of the peace, for there is nothing of alteration appears. All that it does is, whereas, before the king by bill did appoint the *custos rotulorum*, the statute of 3 & 4 Edw. 6. c. 1. has restored it to THE GREAT SEAL. But now this statute of William and Mary does not only make an alteration in returning the appointment of the *custos* into the former channel; but I take it is introductive of a new law, as to the clerk of the peace; for I pray mind the words of it, how it is penned. Saith * the statute of 37 Hen. 8. c. 1. "when the *custos rotulorum* shall have "named the clerk of the peace, he shall enjoy the same office, and "execute it by himself or deputy, during such time as the *custos* continueth *custos*, so as he behave himself well in it." And by that it is plain he had no other title but what depended upon the continuance of the *custos*. But now this latter statute saith, "that whenever "the *custos* shall find the place void, he shall have power to nominate "and appoint a fit person to be clerk of the peace, to execute the "same by himself or his sufficient deputy, and to take the fees for "so long time only as he shall well demean himself." Can any man believe that (which is the only thing in the question, for they had nothing else to say) these words make no alteration of the clerk's estate in his office, from what it was by the statute of 37 Hen. 8. c. 1. And they must say so, or the law is clear for the plaintiff. But when one statute says "he shall have the office, during the time "that the *custos* continueth *custos* upon his good behaviour;" and the other says, "so long only as he shall well demean himself in the "office," that must needs make an alteration. And truly it seems to me that those words are not to be slighted "when he finds the place "to be void" then he shall nominate so and so. There was no need of that by the statute of 37 Hen. 8. c. 1. for there it was always void upon the removal of the *custos*, but here it is limited as to his nomination whensoever it is void, which shews that the parliament meant not that it should be void upon every change of a *custos*. I think, truly, that there is another thing that is very considerable, and it has been observed already by both my brothers; and that is, the great many alterations that are made in this last law concerning the office of clerk of the peace, which were not in the other of 37 Hen. 8. c. 1. for the *custos* now cannot name any person but one resident in the county. The justices of the peace have now a power, if they find he does not demean himself well in his office, to suspend or discharge him, which they had not before. And I take it to be very clear, that if the *custos* do not before the next sessions after such discharge nominate another, they may put in one; and who

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who they put in shall hold the office, not during the pleasure of the *custos*, but "so long time as he shall well demean himself in the office." My brothers having so fully spoken to this case, and it being only upon the construction of short words, in an act of parliament, I think there needs little to be said, and all that can be has been said; and therefore I take it to be clear, that the plaintiff ought to have his judgment.

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* *HOLT Chief Justice.* I will shortly put the case, and it is no more than this. The *Earl of Clare* is made *custos rotulorum* of *Middlesex*, according to the statute of 37 Hen. 8. c. 1. which is revived by the statute of the first of this king and queen. He being so *custos rotulorum*, did, by his deed bearing date the 19th of July, in the first year of the king and queen, constitute the plaintiff *Mr. Harcourt* to be clerk of the peace of that county, to have and execute that office by himself or sufficient deputy, so long as he did well behave himself in it. After this my *Lord of Clare* was removed from the place of *custos*, and my *Lord of Bedford* was duly made *custos rotulorum*, and he being so made, doth by his deed appoint the defendant *Mr. Fox* to be clerk of the peace, for so long time as he should continue *custos rotulorum*, if the said *Mr. Fox* the defendant did well behave himself in the office. And the question is, whether or no, by the amotion of my *Lord of Clare* from the office of *custos rotulorum*, *Mr. Harcourt* the plaintiff doth cease to be clerk of the peace? For then the law is for the defendant, otherwise it is for the plaintiff. And I do concur in opinion with my brothers, that judgment ought to be given for the plaintiff, and that he is still clerk of the peace, notwithstanding that he who made him so, is not still *custos rotulorum*. And this case indeed does depend altogether upon the statute in the first year of this king and queen: but however, it may not be improper before I give the particular reasons that I rely upon, for the ground of my opinion, a little to consider how it comes to pass, that there is such an office as *custos rotulorum*, and how that *custos* comes to have the right to nominate and appoint the clerk of the peace. That the *custos* is not an officer time immemorial is most plain, because the commission of the peace, to which that office relates is not so; but did commence in time of memory; but that he is an ancient officer, doth appear. Whether he was before the first and fourteenth of *Edward* the second, I think is not certain, but that he is an ancient officer may be seen in *Lambard's Eirenarcha*, fo. 371. Now you know the commission of the peace did commence in time of memory; and that the justices were not appointed by the crown, before the first of *Edward* the third, and then they were made in lieu of the conservators of the peace, who were as ancient * officers as the law knew: so says the statute of 1 *Edw.* 3. c. 16. "for the better keeping and maintenance of the peace, the king wills that good men in every county be assigned to keep the peace." In what manner they were to keep the peace, and how they were to execute the authority that was given them by this act of parliament, does not appear; but no question they were to take such methods for the keeping of the peace,

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as the old conservators were. But that not appearing, I take not upon me to determine what method they were to take for keeping of the peace, or whether they were more than high constables. But the statute that makes them compleat judges is, that of 34 *Edw. 3. c. 1.* about what sort of persons shall be justices of the peace, and what authority they have. They were to have a commission; they had authority to hold a court; and thereby they were judges of a court of record. This did give occasion to the commencement of the office of *custos rotulorum*; for they, being judges of record, the records of that court must be in their custody. All indictments and all proceedings upon them, pleas, convictions, acquittals, and judgments must be entered upon record; and, in legal construction, all the justices had them in their custody, and have them to this day; for all *certioraries* are directed to the justices in general; but in regard it might be inconvenient that the records should be dispersed among them promiscuously, and not kept together in one hand, I look upon it that it was in the power of the king to appoint some particular person to have the custody and charge of the records, and that he should be a person responsible to the subject for the safe keeping of them, and to whom he might have resort upon all occasions, when he had any use of them. This was thought convenient; for the words at the end of the commission of the peace are, "we appoint you such an one to be keeper of the records and rolls of the county." So that though legally, as I said, the records are in the possession of all the justices of the peace, all *certioraries*, and all writs of errors being directed to them, yet directly they are in the custody of the *custos rotulorum*, and if by negligence or misdemeanour they happen to be lost or miscarry, he is responsible to the king, and to the subject; for such loss or miscarriage. This seems to me to be the commencement of this office of *custos rotulorum*; for no one being more in commission than another, it was in the power of the king by his prerogative, to appoint one to keep the records. But therefore it does necessarily follow, that no person whatsoever could be *custos*, that was not a justice of peace in commission. The king could not name one that was not in commission, for it would be an errant contradiction to make judges of record, to whom properly the custody of those records belongs, and by any act to take from them that custody, and put in another that was none of the court, to keep the records, when writs are to be directed to the judges of the court, to certify those records when there is occasion to remove them. And therefore by 3 *Hen. 7. c. 1.* If a recognizance for keeping of the peace be returned to the sessions, and the party make default, it is to be certified into the chancery or this court, or the exchequer, by that justice who is *custos rotulorum*. But then, since I have said that it is in the king's power to appoint a particular person, one in the commission of the peace, to have the custody of the rolls and records of the county, how comes it to pass as the statute of 37 *Hen. 8. c. 1.* says, "that the lord chancellor did use to nominate and appoint the *custos rotulorum*?" I say, he named him *virtute officii*; it belongs to him to grant out all commissions of the peace under the great seal, and that

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that he does without a particular warrant legally notwithstanding that statute; and yet he was named by the king in construction of law. For the commission is in the king's name; but actually the chancellor named him, for that is incident to his office, on the behalf, and in the name and stile of the king. So you see it was always done, ever since that statute of 3 & 4 *Edw. 6. c. 1.* before the statute of 37 *Hen. 8. c. 1.* was revived by the statute of 1 *Will. & Mary.* Always the *custos rotulorum* was appointed in the name of the king, but the chancellor or keeper did always grant the commission *virtute officii*, and never had any warrant for these things. But it is the duty of him who has the custody of the great seal to take care for the ordinary and common administration of the government. Now justices of the peace are (though in a subordinate nature) parts of that ordinary administration, and therefore, though they now have a jurisdiction by 34 *Edw. 3. c. 1.* yet it belongs to the same office to issue out those commissions of the peace, as well as those of *oyer and terminer*, which are of course made out with particular warrant for so doing. But then this statute of 37 *Hen. 8. c. 1.* acknowledging "that the power of nominating the *custos rotulorum*, was in the lord chancellor for the time being," it doth look upon it that the taking of it out of the power of the lord chancellor, to do it *virtute officii* without warrant was a better course, and therefore the statute did not repeal that incroachment, but appointed a middle way that the *custos* should be nominated by bill, signed with the king's own hand. That is, my lord chancellor should appoint him by commission, under the great seal, but this must be upon a bill signed with the king's hand as his warrant. This was afterwards thought very inconvenient at every turn, to apply to the king for a bill; and therefore the statute of 3 & 4 *Edw. 6. c. 1.* repealed the statute of 37 *Hen. 8. c. 1.* as to this matter, and restored the lord chancellor to his ancient power of nominating the *custos rotulorum*. So that it is plain that this power which the lord chancellor had was incident to this office; and for this you have the judgment of the parliament in both these statutes. But then in the next place it is to be considered how the *custos rotulorum* comes to make the clerk of the peace. For as my BROTHER GREGORY observed, the clerk of the peace does act for the king as his attorney, and at the sessions does join issue for the king. The *custos* names him for this reason, because the rolls and records of the sessions being by the commission put into the custody of the *custos rotulorum*, the clerk being the person that must be trusted with the rolls to make entries upon, to draw judgments, to record pleas, to join issues, and enter judgments; then of common right, by the common law of the land, it belongs to him that hath the keeping of the records, to nominate this clerk, and not to any one else. And it would be the most unreasonable thing in the world, that the *custos rotulorum* being intrusted with the custody of the records by his commission, any other should be made clerk of the peace, for the actual possession of those records, than such an one as he should appoint, when upon any loss or miscarriage, he is answerable for it himself, to the king and the subject. I appeal to any one whether that be reasonable. My LORD COKE, 2 *Inst.* 425.
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in his comment upon the statute of *Westminster* the second hath a large discourse upon this point, about the judges of this court and the Common Pleas, appointing their clerks to enrol pleas before them in their circuits: and he says this is according to the rule of the common law, that it belongs to them who are judges of record to make their own clerks, and that upon two reasons.

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* FIRST, They are most concerned; their acts are to be recorded; the mistaking of which is a dishonour to the justices, and a prejudice to the party. And,

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SECONDLY, The law intrusts in these matters those that best understand who is most fit and proper to perform the duty of the place; and therefore for the benefit of the subject, and the honour and safety of the person trusted, he ought to have the nomination of that person who is thus to be intrusted under him.

And that was the reason of the judgment in *Mitton's case*, 4 Co. 32. about the office of county clerk, as it is likewise that which is complained of in the statute of 37 Hen. 8. c. 1. that several were made clerks of the peace by grants for life that were insufficient. But in *Mitton's case* the question was, whether the king's grant of the office of county clerk was good; and it was held it was not good; for it was held to be inseparably incident to the office of the sheriff, and could not by any law or contrivance be taken away from him. So that having as well as I can, given an account of the nature of the office of *custos rotulorum*, and the reasonableness of his not having the nomination of the clerk of the peace, I shall now give the particular reasons upon which I ground my judgment in this case. The words of the statute that make the question have been read to you, and therefore I shall not trouble you with the repetition of them. But the reasons I go upon are these:

FIRST, The words themselves in their natural and proper extent, do signify an estate for life, the clerk behaving himself well, as those are the words, "for so long time only as he shall behave himself well in the office." (c) Truly, though the counsel at the bar did not so much insist upon the word "only" as I expected, yet I declare it was the only scruple I had, and should not have doubted the thing at all upon reading the words: and I believe few would have doubted, if the words had been "for so long time as he shall behave himself well" without the word "only." Then it had been so indefinite a limitation, that no man, I think, would have doubted (for my part I should not have made the least question) but that it was an estate for life. Then let us see whether there be any difference by the putting in this word "only." Is not that as long an estate as the other? Is it less for that word? Surely no. If so be, then, "for so * long time as he shall behave himself well," and "for so long time only as he shall behave himself well,"

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(c) 4 Mod. 173. 1 Bac. Abr. 844. Co. Lit. 42. Show. Cases in Parliament, 161.
2 Bac. Abr. 671.

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be of equal extent, then he has an estate for life in the one case, as well as in the other.

SECONDLY, My next reason is this. Here is certainly some power given to the *custos rotulorum*. Now taking it to be a power given by the statute, then the statute intended something, and it being a power to nominate the clerk of the peace, the words that follow must intend a limitation of his estate in his office. For he had a power to nominate before, and here is a power given him anew by this statute. Let us take then the case of a power given to a man without respect to an interest. Suppose a tenant for life by way of use, and a power is given to him to make leases for 21 years only, is not this as much as for twenty-one years absolutely? And he doth make a lease for twenty-one years, and then dies, is not this a good lease. Tenant for life could have made a lease for years before determinable upon his death, and so could the *custos rotulorum* have made a clerk of the peace determinable upon his death or removal before this statute. But then when he has such a power given him by a particular statute, not in respect of this interest, but only of his present possession, certainly this nomination being an execution of his power, when he hath done that, he has done with the business, he has no more to do with this office, the clerk of the peace then being under that constitution which has limited how the clerk so nominated shall be estated in his office.

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THIRDLY, If this clause hath not this construction, it is put into no manner of purpose at all. And I think we should be very bold men when we are intrusted with the execution of the law, and the interpretation of acts of parliament to reject any words that are sensible in an act. And if we should look upon this office to be no otherwise ordered by this act, than it was upon 37 Hen. 8. c. 1. we do reject these words that are thus put into the act. Now to what purpose did the makers of this statute put those words in? for the act of 37 Hen. 8. c. 1. says, "he shall be clerk so long as the *custos* remains in his office, if he behaved himself well." But these words in this act say, "he shall hold the office for so long time only as he shall behave himself well in it," without saying "if so be the *custos* remain *custos*." Therefore that is indefinite and absolute. Why did the makers of this act omit these words, "so long as the *custos* remains *custos*," and put in only these words, "so long time as he shall behave himself well?" Surely there was a reason to omit some words, and put in others. Then if the act had omitted the words, during such time as the *custos* remains in his office, and has mentioned these words, "so long as he behaveth himself well," it is natural and proper to conclude their meaning was, that he should have the office without more ado upon good behaviour. And we are surely to consider this as a new limitation, and that it was made for some purpose or other.

FOURTHLY, The next thing is this; it is plain as to the clerk of the peace, the makers of this act did design the office should not go according as it was appointed by the 37 Hen. 8. c. 1. For,

First,

First, Consider when it comes to the appointment of the *custos*, it mentions the very title of the act of 37 Hen. 8. c. 1. "a bill for *custos rotularum* and clerkship of the peace," which concerns both offices, and takes notice of both. But then as to the *custos*, in exprefs terms it revives the statute of 37 Hen. 8. c. 1. and fays, "the nomination fhall be as is there directed." Now if they had intended the fame for the clerk, there had need to have been added but a few words more, i. e. to have faid, "that this nomination fhould be likewise as in that ftatute." But not doing this, it is plain their intent was, that the clerk of the peace fhould not be appointed in that manner, but the *custos* fhould. And,

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Secondly, It is plain, they did defign and intend an alteration, and to have quite another method obferved; for otherwife why did they make this new provision about it that they have done? If they intended it fhould be as it was, they would either have been filent, and left it untouched, or they would have put it in fuch words as would have declared fuch an intent. And therefore having put in thefe claufes, it is plain an alteration was intended, and that the clerk of the peace fhould be altogether according to a new model.

FIFTHLY, Their intent that he fhould not depend upon the *custos*, does feem plain too; which is another reafon, I go upon. The defign of the makers of this act was, to take off much of that dependance which the clerk before had upon the *custos*, and to make him more dependant on the juftices of the peace. For * before this act the juftices of the peace could not remove him for mifde-meanour, but the *custos* was to do it, becaufe he put him in. It is true the juftices had an intereft in him as their fervant in court, but he that put him in, could only turn him out; but now it is quite otherwife. I do not fay the *custos* cannot do it, but the juftices may, which they could not before; and the ftatute has made three alterations in this claufe.

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First, Before the act the *custos* might appoint any perfon that lived any where elfe to be clerk of the peace; now it muft be only one refident within the county, that is, an inhabitant, where his work lies; fo that the power of the *custos* is abridged in that.

Secondly, Before this ftatute, when the *custos* had appointed the clerk, that clerk could make no deputy whatfoever, but fuch as the *custos* approved of; but here the clerk may make what deputy he will, fo as he be fit for it.

Thirdly, There is another fort of limitation of this eftate in the office, than is in 37 Hen. 8. So that it feems to defign, that the parliament would abridge the power of the *custos*, both in the qualification of the party to be appointed clerk, and in enabling the clerk to make what deputy he would, and to execute the office otherwife than he did before, and in making him a perfon that fhould fubfift upon other limitations in the next place.

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SIXTHLY, It seems to me upon the whole frame of the act, to be the intent of the parliament to make such provision, that the sessions and justices of the peace should always be furnished with an able clerk of the peace; and, to encourage him in the faithful execution of the office, they settle the estate so as to put him out of fear of losing it for any thing but his own misbehaviour in it. If he was a man of approved sufficiency, he was not so easily to be parted with, or upon such an accidental thing as the amotion or death of the *custos*; and it seems the public good was designed; for it was a great mischief to have the office so easily vacable.

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SEVENTHLY, In the last place as to this word "only" which was the only word that made me doubt, I think the design of it was not to limit or lessen the interest of the clerk in his office; but rather to lessen the power of the *custos*, and restrain him; that it should be only in the power of the *custos* to nominate for so long * time as the clerk behaved himself well in the office; and that he himself should not make a grant of it for a less interest or estate, than upon good behaviour. He is so confined up by this act, that he shall not make him *during pleasure*, or *for years*, but when he has nominated him, that is, all he has to do, and then he is in by the act that gives him estate; and this seems to me to be the sense of the whole act. I compare it to the case which my LORD CHIEF JUSTICE HOBART puts of himself in his book, folio 153. in the case of *Colt v. Glover*. Says he, "I cannot grant the offices of my gift as chief justice for less time than for life," and he puts the case there of a man's assigning a rent for dower out of the lands dowable, that it must be for no less estate than life; for the estate was by custom, and it cannot be granted for a lesser estate than what the custom appoints; and in that case of the chief justice, in granting offices in his gift, all that he had to do, was to point out the person that should have the office; the custom settled his estate in it. So here all that the *custos* has to do in reference to this office of clerk of the peace, is to point out the person that should have it; and as the other is in by custom, so here he is in by act of parliament; the *custos* when he has named him, he has executed his authority, and cannot qualify the interest which passes by the act. I am the more inclined to be of this opinion, because I knew the temper and inclination of the parliament, at the time when this act was made; their design was, that men should have places not to hold precariously or determinable upon will and pleasure, but have a certain durable estate, that they might act in them without fear of losing them; we all know it, and our places as judges are so settled, only determinable upon misbehaviour. *Contemporaria expositio legis est optima*, a contemporary exposition of a law, if there be any question about it, as our books tell us, is always the best, because the temper of the law makers is then best known. Therefore upon the whole matter, I take it the clerk of the peace before the statute of 37 Hen. 8. was removable at the pleasure of the *custos rotulorum*, because he was his clerk; but then by that statute he is transformed into an officer, and has a durable estate in his office, as long as the *custos* continued *custos*, and he behaved himself well

well in the office : he has by that statute fees, and a power to make a * deputy, such as the *custos* should approve of ; so that if he behaved himself well, the *custos* could not turn him out. But now I think since the making of this last statute in the first of this king and queen, he has absolutely AN ESTATE for life in his office independent upon the *custos*, and determinable only upon misbehaviour. And for these reasons I do concur with my brothers, that judgment ought to be given for the plaintiff.

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[A WRIT OF ERROR in parliament was brought upon this judgment.

And it was argued for the plaintiff in the writ of error, that this judgment ought to be reversed. And first it was said, that whatsoever the common law was as to ancient offices, could be no rule in this matter : many and most of those were for life ; but my LORD COKE says, that the office of chancellor of England could not be granted to any one for life, because it was never so granted ; the like of treasurer ; so that custom and nothing else can govern in those offices. But here can be no pretence of its being a common law office ; for the common law knew no such thing as justices of the peace, to whom, they say, he is a clerk : The first statute which makes justices, has no mention of clerk ; but it was merely an incident ; some person of necessity was to officiate in that kind ; and where he is called the justice's clerk, it can only be, that he was one appointed by them to make and write their records for them ; and it is probable, that, in ancient time, he that was their clerk was *custos rotulorum*, and intrusted with the keeping of the records ; then it coming to be an honorary thing to be *custos*, he that was the most eminent for quality amongst them, was appointed to that trust, and then he appointed his clerk under him : for there is no ancient statute or law, that empowered the chancellor to make a *custos* ; but he making out the commission of the peace, might very well name one of them to be keeper of the records, and to have the first place amongst them ; and such person might very well appoint his deputy or servant, who in time came to be clerk of the peace. We have no certain, but this is the most probable, account of the thing.

Then the statute of 37 Hen. 8. c. 1. recites, " that the chancellor " had much perverted the institution, by assuming to make *custos's* for " life, and so the clerks of the peace were for life likewise." The end of that act was not only to remove ignorant persons ; for the common law itself would turn any such out of office, if he be not able to perform the duty of it ; but the grants for life, were the great grievance ; and therefore to remedy that mischief the *custos* must be appointed by bill signed with the king's own hand, and at his pleasure removeable, and the clerk of the peace to be appointed by the *custos*, and to continue only during the time of the others continuing to be *custos*. This (though not in the negative) doth amount to it, viz. that he shall continue no longer ; especially when the act recites the mischief to be a continuance during life : it implies that the clerkship of the peace should be never granted, for a longer

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interest, than the *custos* had in his office. The 3 and 4 *Edw. 6.* does indeed repeal part of the 37 *Hen. 8.* not by express words, but by a very strong implication, by giving the chancellor a power to nominate the *custos*; but the office of clerk of the peace is not touched by that of *Edw. 6.* and continues as settled by 37 *Hen. 8.* which is during the continuance of the *custos*.

Then it is the new statute, which gives the occasion of the present dispute; and there is nothing in this act, which can make such an alteration in the law, as was below contended for: the words, *so long only as he shall well demean himself*, are not enlarging of his estate, but restrictive; and whensoever it is considered how to make a grant for life to be good, you must consider the power and capacity of the grantor, and how the thing is capable of being so granted; as in case of tenant in tail or fee, and each make a lease for life; in the latter case, it is for the life of the lessee; and in the former, for the life of the tenant in tail, because of the different capacities of the grantors; and so the thing itself is considerable; here is an express statute, that saith "it shall be only during the continuance of the *custos*:" now that provision is to be pursued: it is said, that a grant *quandiu se bene gesserit*, is for life; but the words themselves do not import any such thing; it is indeed a restrictive condition which the law imposes upon all offices; for misbehaviour in any office, if in fee, is a forfeiture; but the chief consideration is, if it be an office that is capable of being granted for life; if it be so, these words may amount to a grant for life, as expounded by usage and the nature or capacity of the office itself; but otherwise, if the office be not grantable for life, such words will not give an estate for life: these words seem only to be an expression of what the law always implies, though not particularly expressed. If it operate any thing, it seems only to have reference to the power of the grantor, as a restriction on him, and not as an enlargement of the estate of the grantee, especially where by a law in being there is an incapacity upon the very office not to be granted for life.

Then it was urged that the statute of 37 *Hen. 8.* was not repealed: the 3 and 4 *Edw. 6.* doth not alter this matter at all; and where it did make any alteration, the same is expressly repealed by this last act in question. It is a settled rule, that if there be two statutes, and both consistent and not contradictory, the latter can never be said to repeal the former; and so is *Dr. Foster's case*, 11 *Rep. 5, 6.* so it is in *Wills, Hodgkinson and Wood, Cro. Car. 23.* This last act of *Will. and Mary* is consistent with the 37 *Hen. 8.* the one says, "he shall continue during the time that the *custos* doth remain such, so as he demean himself well:" the other says, "he shall enjoy his place, so long only as he demeans himself well in it." Now take the office to be by the 37 *Hen. 8.* only grantable to hold during the continuance of the *custos*, then suppose in the same act, it should be said "to hold so long only as he demean himself well;" where is the inconsistency or contradiction? And if none, then this last act does not repeal the former as to this matter. And
Mr.

Mr. Fox's grant is pursuant to the statute of Hen. 8. and Mr. Harcourt's has no relation to it.

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Then it was argued that it was unreasonable that a *custos* should have an officer under him of another's choice, when himself is responsible for the records which such officer is concerned with. The primary intent of this last act was only to settle the doubts about the keepers of THE GREAT SEAL, not to alter the estate of the office of clerk of the peace. The offices of the judges in *Westminster-hall* determine with the king's life who grants them, though they are granted to hold during good behaviour. In this act, the reason of using these words, was for caution, to advertise them that misbehaviour should forfeit their places. If an alteration of the law had been intended, they would have said, "for life, so as he demean himself well," especially when (as was said before) he was removeable for misbehaviour by the former laws in being. Wherefore upon the whole matter, it was prayed that the judgment might be reversed.

But now by
1 Geo. 3. c. 23.
the commission
of judges shall
continue in
force during
their good beha-
viour, notwith-
standing the de-
mise of the
crown. See
2 Hawk. P. C. 4.

On the other side it was argued with the judgment, that it is clear and apparent that this act of *W. & M.* was made not only to satisfy doubts, and prevent questions about the office for the custody of the great seal, but to settle the manner of naming the *custos* and clerk of the peace; and that it is in part introductive of a new law; and in part a reviver of the old: but the general end was, that that office of clerk should be filled and executed by a learned, able, honest person, because it concerns the administration of justice. He is the king's attorney in many respects: he not only writes the sense of the justices in their orders, but draws indictments, and, upon traverses, he joins issue, as one *qui pro domino rege in ea parte sequitur*, and prays judgment for the king in many cases; joins in demurrer, when occasion requires, and is, in the sessions, the same as the clerk of the crown is in the *King's Bench*. Now to accomplish this end of having a person well qualified, and to encourage and oblige him to his good behaviour, it requires a residence in the county; it enjoins that the person named be able; it subjects him to the jurisdiction of the justices, who have a daily observance of his demeanour; it gives them a power to remove him upon a just complaint, which they could not before; it frees him from the usual temptation to fraud and corruption, by introducing him *gratis et sine pretio*; and, to provoke his care and diligence, it gives him a more durable estate in his office than he had before, when he bought it, *viz.* freehold, an estate for his life: that it should be so is convenient; because then he will be encouraged to endeavour the increase of his knowledge in that employment, which he may enjoy during life; whereas precarious dependent interests in places tempt men to the contrary.

That this is an estate for life, appears from the words of the act; they do direct how long he shall enjoy his office, "so long only as he shall behave himself well:" if the word *only* had been omitted, there could be no colour for a doubt; by *Co. Lit.* 42. it is an estate for life determinable upon misbehaviour; for "during good behaviour" is

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during life; it is so long as he doth behave himself well; *i. e.* If he behaves himself well in it so long as he lives, he is to have it so long as he lives; *during life*, and *during good demeanour*, are therefore synonymous phrases; the same thing when used with relation to offices; the condition annexed, if observed, continues it during life; the contrary determines it: this is the rule and law in case of offices in general, and must hold in this; for this is an office, 2 Hen. 7. 1. He is called *att' domini regis*; it is capable of being enjoyed for life, and consequently of being granted so, especially when an act of parliament declares it shall be so; there is nothing in the nature of the employment that hinders it; and there can be no doubt, but that a statute may empower a *custos* in possession, who has only an estate at will, to name a clerk to hold during life or good behaviour; the justices are at pleasure; suppose then the act had said, that they should name him in this manner, he must have continued, though they had died, or had been removed; the case is the same here; he is as much intrusted with the acts of the justices, as with the records belonging to the keeping of the *custos*. Then there is nothing in the act that favours of an intention to make him dependent on the *custos's* office. The *custos* is to name him, but the justices have the controul over him; he is an officer to the sessions, and the justices only can remove him. The limitation of the interest of the *custos* in his office, and that of the clerk, are different; and that shews that the duration of the one was not to depend on the other. Besides, the *custos* is to name, not "when he shall be made *custos*" (as it would have been worded, if the intention advanced on the other side had been true) but "whenever it shall be void." It does not say, every new *custos* shall, or that every *custos* shall name; but generally "when it is void, he shall, &c."

Then as to the objection, that this new act is consistent with the 37 Hen. 8. and therefore that is still in force? It was answered, that by the former act, he was intirely placed under the *custos*, who had power to displace him upon miscarriage; the sessions then could not do it, though a court, and a court of record: they might suspend him, but could not deprive him of his office, even for ill demeanour: this was that act. Now the present law abridges the power of the *custos*; he must name a resident; before he might appoint any able person; the person was then removeable by the *custos*, now only by the justices; care is taken that nothing is to be given for the office; and now he may make a deputy without the approbation of the *custos*. Here is plainly a different jurisdiction over him, and a different estate vested in him; this express limitation of the interest to him is an exclusion of the former estate, as dependent upon that of the *custos*. And besides, this is a substantive distinct enacting clause of itself, and no ways relating to the statute of Hen. 8. Why was this limitation penned differently from that, unless to give another sort of interest. As to the cases of new laws which repeal former, it was said, that the rule was certain, that whatsoever statute is introductive of a new law, though penned in the affirmative, is a repeal of the former, as implying a negative;

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tive; *i. e.* the latter ought to be observed, if it concerns the same matter. The statute of *Edw. 6.* controuled the statute of *Hen. 8.* One directed *the keeper* to name, the other *the king*, and both are in the affirmative; yet the latter must be observed. And if this be a new estate (as it has been adjudged below) then the party ought to enjoy it. And for this was cited 1 *Sid. 55. Plowd. 113.* and other books. Then it was said, that the clerk of the peace, named by the justices, in default of the *custos*, would have an estate for life; and by the same reason it ought to be so here: though the *custos* be to be named, according to the statute of *Hen. 8.* yet he is not to execute his power of *custos* according to that act, but is tied to a resident; hath not the approbation of a deputy; and cannot remove. By the statute of *Hen. 8.* the clerk had but an estate at the will of the king, the *custos* having no other: this is so long as he doth well in his office; these are different; and when the *custos* hath named him, he is in by the statute. If what they on the other side contend for, had been intended, there was no need of these words of limitation at all; and the words, *in like manner as by the former act*, had fulfilled the intention, if such had been.

As to the word *only*, that would make no alteration in the case of any other office. Suppose an office granted to a man *quamdiu tantum*, or *solummodo se bene gesserit*, would that give less than an estate for life; the word *only* was added, not to abridge the estate of the clerk, but rather to restrain the power of the *custos*, that he should have authority only to limit it during good behaviour, and not for a less interest or estate: the *custos* is confined, that he shall not grant it for years, or at pleasure. Besides, *only* is but *just so long*, and *no longer*, or *so long as*; and it is the same thing with the word, as without it. *Dummodo sola vixerit*, is *during all her widowhood*. Suppose a power to make leases to hold only for and during the term of 21 years, the same would be good for the whole term. Then it is no objection, that the estate of the clerk is greater than his is who names him, for that may be by custom, as in the offices in *Westminster Hall*, *Hobart 153.* and the clerks of assize, where usage fixes the estate. And the like in case of power to make leases upon family settlements to uses, where tenant for life grants larger interests than his own: it is true, the powers and estates raised by them, issue out of the inheritance, but the tenant for life only names them, as the *custos* doth here, though the statute gives the interest.

As to the inconvenience that dependent offices should continue against the will of their superiors, that can be no objection, since there are few great officers in the realm, but have many substitutes and inferiors under them, which were named by their predecessors, and are not removeable; almost every bishop in *England* is under these circumstances, with respect to the register of his own court, who notes and records his acts, &c. This is an exception to all grants for lives; but credit ought to be given to the honour, wisdom, and judgment of former, as well as present

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officers, in respect of such nominations, until some misbehaviour shews the choice to have been ill ; and when that appears, the persons are removable, and then the inconvenience is likewise removed. Here the jury have found the plaintiff in the action below, to be able and sufficient, and well qualified for the office, and to have done his duty in the office, while he had it.

Wherefore it was prayed that the judgment might be affirmed ; and it was affirmed.]

* Michaelmas Term,

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The Fourth of James the Second,

I N

T H E K I N G ' s B E N C H .

The Sixth of November, 1688.

Sir ROBERT WRIGHT, *Knt. Chief Justice.*

Sir JOHN POWELL, *Knt.*

Sir ROBERT BALDOCK, *Knt.* } *Justices.*

STRINGER, *Knt.*

Sir THOMAS POWIS, *Knt. Attorney General.*

Sir WILLIAM WILLIAMS, *Knt. Solicitor General.*

Hitchins, *on the demise of Nosworthy, against Basset.* Case 265.

EJECTMENT: On a trial *at bar* for the manor of *Lanrock* and other lands in *Cornwall*, THE JURY, on *not guilty* pleaded, find a special verdict; *viz.* That *Sir Henry Killebrew*, was seised in fee of the lands in question; and on the 12th of *November 1644*, made his will in writing, which follows in these words, "I *Henry Killebrew, &c.*" and so they set forth the will, whereby *Sir Henry Killebrew* devised the premisses to *Mrs. Jane Berkley* (his near kinswoman) for life; with remainder over to *Henry Killebrew, alias Hill* (*Sir Henry's* natural son) in tail, and makes *Mrs. Berkley* sole executrix. They further find, that after the making of that testament, and before the time when, *&c. viz.* about the feast of

In ejectment: if a special verdict find that A. being seised of the lands in fee, in the year 1644, devised the same to B. for life, with a remainder to C. in tail, &c. "and that afterwards in the year 1645 the said tes-

tator made another will in writing, but what was contained in the said last mentioned will juratores penitus ignorant." This second will, so found, does not amount to a REVOCATION of the first will; for although he made a second will, yet as the contents are not known, it may, for any thing that appears to the contrary, be consistent with the first will. — S. C. Comb. 90. 209. S. C. 3 Mod. 203. S. C. Salk. 592. S. C. Show. Caf. Par. 146. Hardies, 375. Cro. Eliz. 721. Cro. Jac. 94. 2 Salk. 592. Comb. 90. 209. 3 Mod. 303. Swinb. 15. Ship. Touch. 410. Cowp. 87.

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St. Michael, in the year 1645, *confidit et fecit aliud testamentum in scriptis, sed quid fuit content' in eodem ult' mentionat' testamento, vel quale fuit purportum sive effectus inde, juratoribus præd' non constat.* And that *Sir Henry* on the 29th of September 1646, died seised of the said lands; that *Mrs. Jane Barkley*, devisee of the said will, in 1644, by lease and release conveyed to *Mr. Nofworthy's* father; that the father died in 1684; that *Mr. Nofworthy* is son and heir to him; that *Sir William Basset* is cousin and heir to *Sir Henry*, viz. son and heir of *Elizabeth Basset*, daughter and heir of *Sir Joseph Killigrew*, elder brother of *Sir Henry* the testator; and that *Nofworthy* the lessor of the plaintiff, entered and made the lease in the declaration, &c. But upon the whole matter, whether the said testament made in writing 1645, was A REVOCATION in law of the said devise of the said lands to *Mrs. Berkley*, they are ignorant, and pray the judgment of the court, *et si, &c.*

MAYNARD Serjeant. May it please your lordship, *John Hitchins* is plaintiff, and *Sir William Basset* is the defendant, in an ejectment of the manor of *Lanrake*, &c. in the county of *Cornwall*. The lessor, whose title is in question, is *Mr. E. Nofworthy*: his title, as it is found by the special verdict, is this. *Sir Henry Killigrew* was seised of these lands in fee, and in the year 1644, made his will, which is found in *hæc verba*. He makes a deliberate will (and shews his reasons why he made it) and thereby gives his land to his cousin *Berkley* for his life; under whom a good title, (if there be no revocation of the will,) is derived to the lessor of the plaintiff. But they find further, that in the year 1645, this *Sir H. Killigrew* made another will. But what are the contents? These are the words of the verdict; "*made aliud testatum in writing; but quod 'fuit content', &c. juratores ignorant.*" And conclude, if the Court adjudge the last * a revocation of the first, then they find for the defendant; if not, they find for the plaintiff.

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THE CASE is short, and is but this. A man seised in fee makes a will in writing, and devises his land, and that deliberately, and upon reasons given; and he does a year after make another will; but the jury find not what were the contents of it: and what the meaning and effect of it was, that they know not; and refer it to the judgment of the Court, whether this be a revocation or no.

My LORD, under favour, it can upon no reason in the world be said to be a revocation, but the first will does stand, and the last signifies nothing. Before I enter into my argument, I must observe the case has been argued before (a), and we know one another's reasons. And I shall state to your lordship where the difference is between us. We do not differ what the nature of a last will is. A will is a publication of a man's mind, as to what he will have done with his estate after his death. And we do agree, every will is revocable. And though a man should have said he would not revoke it, yet at the time when this will was made, he might have revoked it by parol. But that wherein we differ, is this. It is

(a) It was argued in the Easter Term preceding, by FINCH for the plaintiff.

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said on their part, that any will whatever it be that comes after another, is absolutely in law a *revocation* of the former; that my lord, we do differ in. We say, a man may make a will of several things at several times, and they both shall stand, and one not trip up the heels of the other. As for the purpose, "as to my lands in the province of *Canterbury*, and goods there, I give them to *J. S.*" I may afterwards say; "as to my lands in the province of *York*, and goods there, I give them to *J. D.*" this will does not revoke the other. If a man settle his land or estate upon his wife and children, and five or six years after another child is born; and he says, "I give my last child born five hundred pounds," this shall not undo what was done before. That they deny. MY LORD, if a man shall settle his estate upon his wife and children, and afterwards being pleased with his tender, says he, I give so much to my tender, all is void, if what they say is true. But, I affirm it, that a man may make two wills, and both stand together where they are of two several things, and not contradictory one to the other. The question upon the whole case is, whether a deliberate will being made, and after a will that they know not what the contents of it is, whether that be a revocation of the former? the question is upon * the whole *in complexa*, as the verdict is found. Upon that they do not know as well as that they do know. I ground myself *first* upon the nature of a verdict. A verdict when it is found, there can be nothing added to it, nor nothing taken from it; but as it is found, so the court must judge of it.—SECONDLY, MY LORD, I say this, that whatsoever is found in a verdict, whereupon the Court can give any judgment, must be positively found, not ambiguously; for if the jury do doubt, the Court can never resolve the matter of fact. Nay, to go a degree further, if the jury do find positively the matter of argument, and do not make the conclusion *de facto*, the Court shall reject the matter of argument, and give judgment to the contrary: the reason is plain, because *an attaint* lies upon a false verdict, and a man cannot be attainted upon what he doubts. The authorities are herein very plain in the case of *Crisp v. Pratt*. (b) Issue being joined upon a fraud, it was adjudged there, that though there be never so many circumstances of a fraud found, unless the jury find it to be a fraud, the Court shall adjudge it to be none. In the case of the Earl of *Lincoln v. Lady Gorge* (c). A man purchases land and pays for it, and directs a conveyance to his daughter who knew nothing of it, but he kept the possession, took the profits of it, and declared that he was owner of it; and when all this was done, he made a mortgage of it; and the question came between the daughter and the mortgagee: says the mortgagee it is a fraud, and without doubt the Court would hold it so; but the jury finding only the evidence, and not that it was a fraud, judgment was given for the daughter against the mortgagee. The question was upon the evidence, whether resignation or no? The jury find a special verdict, the evidence thus; that he was the person that signed the instrument of resignation, and sealed and delivered as his act and deed to the register, &c.;

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(b) Cro. Car. 549.

(c) Noy, 154.

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and the question was, whether upon that verdict the Court should adjudge it a resignation, because they did not find the bishop agreed; and, the jury being ignorant, certainly the Court must be more ignorant than they. Nay the Court must know the contrary, for they can take no notice of what is dubiously found. MY * LORD, this is not only a precedent, but the constant and rational judgment of mankind, *de non apparentibus et non existentibus eadem est ratio et judicium*. It is expressed in a record of *darrein presentment* (d) against *William Duras* (where the Court in those times did enter the reason of their judgment; the reason is thus; "*quotiescunque juratores dubitant an aliquid sit, perinde est ac si non esset.*" Where can you find in all this verdict (nay the jury say they do not know) what were the contents of this will? Pray, my lord, where will you look to find the contents when they find none? where will you find there vocation of a will? Why, my lord, I think, under favour, if I had said no more I had said enough. But there has been much earnestness in this case, and therefore I will not rest here. MY LORD, they see the objection, and therefore never go about to argue that point that is found by the jury, but have found out a way to leave out half the verdict: and because the jury have found *another will*, they have taken upon them an invention of their own, that is, say they, when there is a second will found by the verdict, the first is void. But, my lord, they go out of the verdict and find a will in the clouds; and are like squirrels hunted from one tree to another. But, I will gratify them in it; take the case. Here is a good will, as appears upon the reasons set forth; and after the testator makes another will; what is given by this? Nothing. The jury find there is none; and now they put you to hunt for it. Pray go to blind-man's buff, and let the Court find it out. I am sure there can be but conjecture, they cannot prophecy at this day. And if no body can say what the will is, can they say it is a revocation? My lord, there was replied to them that made this objection; but what if a man makes a latter will the very same? *Sir H. Killigrew* (and a gallant gentleman he was) left his will with his cousin, and then within a year, was feign to go into *France* without any occasion of change at all given him of the one side or the other, and he makes another will, and what that will was is not known, what if the latter will were a confirmation of the former? how if it were expressly the same with the former? what was the answer to that? Ay, but that was not likely. Surely it was more likely he should confirm his will, than destroy it. But, to go no further, he might do it, and that is enough for me. And then the presumption is false they go upon. MY LORD, if I did conclude here again, I say I need go no further. When a judgment was anciently entered, they used to enter their reasons. Now they enter it only "*quibus visis lectis * et auditis et per cur. plene intellectis, &c.*" Now if this judgment should be entered, when was this read to the Court? where was it seen? what was it the Court understood? what fact is here

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(d) The Year Book, 4 Edw. 1. pl.

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found for the Court to deliberate and consider on? My lord, it is a strange case; but I will go further, and take upon me by reason and full authorities to prove against them, that they are mistaken in the law. I will give my authorities and reasons, and answer their authorities and reasons pretended. For the authorities of my part, I begin with a judgment, a book cited by themselves, but so cautiously they would not put the case at large. *Peckham, 2 Rich. 3. fol. 3.* An action of trespass was brought for taking away goods; the defendant pleads that the testator was possessed of these goods as his own goods, and made the defendant executor, &c.; and to this bar the plaintiff replied, and confessed and avoided the bar thus; says he, it is true, he did make the defendant executor, but afterwards he made another will, and thereby made me executor; and thereupon I took the goods and brought the action; and it was questioned, whether it was good without a traverse; and it was adjudged good. I say, this is a judgment for me. Their affirmation is, if there be a will, though nobody knows what it should be, it is a revocation of any former will. My lord, in this case they prove there was another will, but rest not there; but say, he made me executor by it. What does the Court say to this? *quisquis in vita sua facit al' testamentum, &c.* Whoever makes another will, and makes another executor, the law revokes the former *pro hoc*. Why does it? *pro hoc quod al' executor nominatur. Et si, &c.* It is as full for me as a man can speak. Why was it a revocation? Because by it he made another executor. And why so? Because a man never makes a will, but that if he does any thing afterwards by which the Court may understand the will is changed, it is revoked. When the reason is with me, the judgment is with me. Now, the reason was not the making the will, but the naming another executor. In 15 *Hen. 7. fol. 17.* it is a rule given by the Chief Justice: when a will is made, the Court must look what the words are, and so judge. Now where are the words of this will to judge by? if there be none, then you can judge it no revocation. My lord, the next book is in *Anderson's Reports, 721.* The case is there thus (*placita*); but I will not mistake the case; the case was this: A man does devise to his son his lands to him and his heirs; afterwards he makes another will, and thereby he did devise the same lands to his wife for life, paying the son, &c.; and the question was, whether this last will was a revocation of the former? it was finely cited: they told you, two lawyers were of opinion it was none; they might have been pleased to have given due honour to them; it was *ANDERSON Chief Justice*, and *GLANVILL*, a very learned judge. And why was it no revocation? because they may both stand together. This case *Anderson* reports (*e*) as his own opinion, as a judgment upon the bench by HIM and *GLANVILL*, and it seems there was no other judge upon the bench. Next to this I shall cite *Hodgkinson's case*. (*f*) A man devises the fee simple of his land; and afterwards makes a lease of the same lands to *J. D.* for thirty years, to commence after the death of the testator; it came in question, whether it was a devise

Cro. Eliz. 722.
Cro. Jac. 691.
Cro. Car. 24.
3 Mod. 204.
2 Salk. 592.
Gilb. Wills, 415.

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(*e*) 1 And. 721.(*f*) Co. 23.

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of the fee simple or no? and in that case both could not stand wholly: they agree, that if it had been a lease for twenty-one years, it had been no revocation; but being to commence after the death, it must be a revocation; but of what? not of the whole, but only *de tanto*; and the case cited out of *Anderfon*, is cited there, and the reason of the case by which that has a double authority. I will cite you another judgment and resolution too, in *Cro. Car.* 51. (g) A man makes his will, and by his will he devised legacies to two brothers that he had; and afterwards fell sick, and then makes another will: he was asked by some then, who should be his executor? and he named his wife: and being asked, what he would do for his brothers, to whom in truth he had given each a legacy? "I will give them nothing," says he, but then he gave a legacy to his godson, &c. The question is not there, whether the latter will was a revocation of the former; but because of these words "I will give him nothing," it was doubted, whether it referred to the time of his indisposition then, "I will give him nothing now:" or whether it was so general as it should repeal the former legacy by the former will? the resolution upon hearing counsel was, that it was no revocation of the former legacy; and the reason is, because in *dubii non præsumitur pro testamento*. That there may be two wills, is *Den's case*. (h) There it is expressly said that if a man make one will of goods, and another of his lands, and a revocation is alledged of both, a prohibition shall be granted for the one, and denied for the other. And * I heard it in the case of *Neller v. Brell*. (i) JONES and BERKLEY Justices put this very case, that if a man make two wills, one of his lands, and another of his goods, a prohibition shall go only as touching his lands, and not concerning his goods; but where an *intire will* is made of lands and goods, a consultation shall go to the whole, because the examination of the whole will do no hurt. MY LORD, they cite *Swinbourn* and *Godolphin*: but you shall see how much to their purpose. In *Godolphin* (k) it is expressly said thus, that a man cannot properly make two wills, unless it be of several things; and in *Swinbourn*, that a man of several things, may make several wills. (l) And *Perkins* (m) says expressly, if a man make two wills, the latter shall stand; and the other not, *nisi sit* in special cases. MY LORD, in this very case, this point was in the exchequer; and I think they rely very much upon it. A bill was exhibited on the behalf of the wife of *Seymour*, by this *Basset's* ancestor that is now defendant and heir to *Sir Henry Killigrew*, that made the will. I have perused exactly the proceedings: the bill consisted of two parts, one impeaching the will, the other was that *Mr. Nofworthy* had purchased in a statute, which statute (they made the usual suggestion) they said was satisfied. In the proceedings in this case, the Court directed a special issue, that was, whether this will under which *Mr. Nofworthy* claimed, was revoked, yea or no? that was the issue; and there was something led the jury to find it,

(g) *Eyres v. Eyres*.
(h) *Cro. Car.* 114, 115.
(i) *Cro. Car.* 395.

(k) *Godolphin's Orphan's Legacy*, 23.
(l) *Swinb. on Wills*, 253.
(m) *Perk.* 179.

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and it came back to the Court, and the Court disliked the verdict. Says the *old gentleman*, how could they be of that opinion? and he directed a new trial; (he was no ways satisfied with the former.) And then in effect upon the new trial, it was found as here, they find no contents, but find a second will, but that it did not concern the lands at all; and it came to be heard again in court. If it were a revocation, then without all question the judgment of the Court ought to have been, to have an account upon *the extent*, whether satisfied or not; but the Court was so far satisfied, that they dismissed their bill out of court. I speak this the rather, because it was the judgment of my LORD CHIEF BARON HALES, of whom, as VIRGIL says, "*nec justior ullus, nec*," &c. Then came into chancery a very learned judge, my LORD NOTTINGHAM. He directs that we should prove ourselves a purchaser, for if we did not, it was another case. And what was the consequence? He granted us a perpetual injunction. But they go * before the Master of the Rolls, and get a discharge of the extent, and then came to fence upon the will. MY LORD, this court was of opinion with us, and one said, here was a great deal of stir to make something of nothing. MY LORD, I have cited and gone over the authorities of our books, but I will mention one more. *Lord Coke* in his Commentary upon *Littleton*, in "tenure by burgage," puts this case, if a man make two wills and devises, there the latter will and devise shall stand, the other not, that is a general rule. *Lord Coke* takes notice, and comments upon these words, "several devises," there is the same law of chattels, as of inheritances. A man in *France* makes a will, and gives several legacies, and afterwards he makes a will in *England*, but what he gave in the latter *non constat*, it was adjudged the last was no revocation: it was said indeed, it might be a revocation; but it might also as well not be. If a man will say a latter will revokes a former, he must prove it; for (say they) *ademptio non presumitur nisi*, &c. Another expression they have, *si deviseris codicello quæ præcedunt et quæ sequuntur, idem est ut si in eodem testamento continentur*. A codicil is a last will without an executor. Now in this case, whether it be contained in the will before or after, it is the same thing. MY LORD, I have gone a great way over all these books, and I think upon these authorities it is very plain. They cite *Littleton*, the case that I cited before: if a man make several wills and devises, the last will and devise shall stand. MY LORD, there can be no devise where there is no sense; nothing to be understood at all, as in our case. It is a general rule, and a case put by *LITTLETON obiter*, by the way. There are four cases put, and I agree every one of them to be good law; as good law as the conclusion is bad. A man devises his lands in fee simple; then he makes a feoffment in fee under hand and seal, and to the deed of feoffment he makes a letter of attorney, to give livery and seisin, and as it is in *Moor's Reports*, the feoffment is void, but the revocation is good. The other three cases were upon the devising lands to *J. S.*; and after devises them, first to *a monk*; and secondly, to *a corporation*; and thirdly to *a parish*; where all are incapable to take, these wills are void; and yet they are a revocation, and here was a kind of an huzza upon that; but here it is expressed another shall have

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Poph. 108.
3 Mod. 429.
2 Salk. 592.
Went. Ek. 22.
Gilb. Wills, 413.

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Powel on De-
vites, 18.

* [545]

have it; and though the party cannot take, yet his mind is plain that the other should not have it, so his mind was changed. MY LORD, I have here a case, I would presume to read it, as it is in my reports; I wrote it about fifty years ago, and is as good as any has been printed since. *P. Deilore* was seised of lands in *Blackfriars*, &c. and made his will, and by that, first devised the lands in *Blackfriars*, to the hospital of *B.* in *Smithfield*, and afterwards makes another will, and devises lands he had in another parish to another. It was held by all the judges, that this last will was not a revocation of the former, for both wills being of diverse things, may well stand together.

LORD CHIEF JUSTICE. Whose reports are they?

MR. S. MAYNARD. I did not take the name. I copied it with my own hand. I did not copy the whole book, but only some special cases.

See 29 Car. 2.
c. 3.

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Now, MY LORD, I come to my reasons that I shall give. The first reason is from the nature of a will: a will is the disposition (not the last disposition) but a declaration of what a man will have done with his estate after his death. There are three degrees or steps of making it, the conception, the birth, and the legitimation. The conception is, when a man is resolved, I will do it; and so if he dies it becomes *embrio mortuus*, and signifies nothing. The birth is when he publishes it, but these are positive laws; the civil laws require two, and our law now three, to make it effectual. And if a man do it without these, it is his will, but it is *mutua lingua*, it cannot speak in any court on any behalf. But if he observe the solemnity of the law, then it has its legitimation. As for instance, if a man at this day make his will, and give his land and a thousand pounds to *J. S.* and has four witnesses, but does not subscribe his name in their presence, this is a good will for *the money*, but for *the land* it is void, yet it is in the very same paper. Now what is the essence of the will? is the subscribing, or calling of witnesses an essential part? It is not; it is *causa sine qua non*; it is that without which the Court cannot take notice of it; but the essential part is the meaning of the party. But what can be the meaning of this? Not one part of it appears; a logician can make nothing of it; there is neither *subiectum* nor *predicatum*. Another * reason is from the definition of a will. Here is no declaration of his mind whatsoever; a will is made; but what does he declare by it? Nothing. Another thing is *quodque dissolvitur eo modo quo ligatur*. When a will is made, a man discovers his mind as to the disposition of his estate; and if you will have a revocation, there must appear his meaning to revoke it; where is that? A third thing is this, in pleading: suppose the now defendant *Basset* should bring trespass against *Mr. Neworthy*, and he should defend himself by this will, were it a good replication to say, he made another will, and shew not what it was for? If the replication and bar may both be true, it cannot be an avoidance of the bar. MY LORD, when a man has made another will, is it necessary? No; it is but contingent, whether he will revoke the former

or

or no; when he has made another will and keeps it to himself, can any one say it is necessarily a revocation, or it is only a contingent? Upon the whole matter I must conclude, and leave it to your lordship, whether you shall think fit to take away a man's estate upon such a conjecture. I am sure there is no ground to conclude it a revocation.

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PEMBERTON *Serjeant*. May it please your lordship, I am of counsel for the defendant. The special verdict has found as my brother has opened it. Sir Henry Killigrew makes a will, in the year 1644, and gives this estate to Mrs. Berkley for life, and afterwards he comes and makes another will in the year 1645, which is found he made "a testamentum;" and then they derive a title under Mrs. Berkley to the lessor of the plaintiff, and find that Mrs. Berkley, whose estate was for life, is alive, and find the defendant heir to Sir Henry Killigrew: and that is the substance of the verdict.

MAYNARD *Serjeant*. You omit the latter part of it.

PEMBERTON *Serjeant*. That is, they find he made another will, but it does not appear to them what are the contents of it, and refer it to the Court, whether it be a revocation of the former will or not? The * sole question in this will be, whether the making of a latter will do destroy the former will or not? Here is a will found, which devises the estate to Mrs. Berkley by Sir Henry Killigrew, under which the lessor is a purchaser; and it is also found that he made a latter will a year after; and if the latter will has revoked the former, there is an end of the plaintiff's title. That that really has, I hope to prove to your lordship. My brother MAYNARD says, and it is a common maxim, that a will is revokable so long as the testator lives; and I thought it to be as plain a rule too, that a latter will revokes all former. MY LORD, I do not find it is denied in words, but they would by a distinction evade it. Say they, it is true, a latter will revokes a former, if it have words of revocation, or the matter is inconsistent with the former. This is the distinction they of the other side have made, in the case. But if it have no words of revocation or be not contradictory, it shall not; that say they. MY LORD, because of this distinction (which I think has no foundation in authority or reason, but because of this distinction) and that I may the more clearly proceed, I will cite two or three books that speak of this rule. Swinbourn, enumerates the ways by which a will may be revoked: and in the first place, he mentions by making a latter will. His words are these, "if a man make a thousand wills, the last is the best, and makes void all the rest." (n) And he puts the case, to which my brother MAYNARD does agree, that though there be an oath that he will not, or a clause in the former will, that he will not revoke it; yet the last shall stand, because the law is so; the making the last revokes all the rest. And so in the very same terms is the gloss upon it (o) and I suppose Swinbourn had it from thence. He says "*Effectus voluntatis est quod secundum eam pronun-*

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(n) Swinbourn on Wills, page 7. section 24.

(o) Gloss 109. page 75. chapter "of TESTAMENTS."

"fietur."

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"*tictur*." What is contained in the last will *est examinabitur*. In the office of executor (p), it is expressly laid down as a ground, "that every making of a latter will is a countermand and revocation of all former wills." And upon this he collects and notes; says he, "a nuncupative will revokes a former will, though never so formally made, and in writing." And so *Pertinax*, in the place my brother has cited, is to the same effect. Then, MY LORD, there is 2 Hen. 5. pl. 8. Now, pray what does *Lindford* and others mean, by saying, "the making the latter will makes the former void." Is their meaning, that the latter will shall make void the former, if it contain words of revocation? If that be all, truly they might have spared * their pains, for nobody would dispute that, if there be a clause of revocation; for a revocation without it by parol would avoid it. Does he mean this, that a latter will would revoke a former, if it were contrary to it? Surely no, for a deed will revoke it where it is contrary to it, and so will a codicil, and a void will will revoke it; for if a man give it to a corporation, where there is none such in the world, that will revoke it; so he must mean something further: and their meaning is this, they were discourting of the nature of a will, and something that is particular to a will, to that instrument more than to any other instrument; now, whereas a deed or any thing might revoke it, if it were contrary, whereas by word a man might revoke it *in terminis*: now, say they, by making a will, the former are all destroyed. MY LORD, their words are plain, and I think there is no ground to intend their meaning otherwise than their words import, that is, by making the last will, all the rest shall become void; not to put it upon the contents of the will, or any thing of that; and this seems to be agreeable to reason, if your lordship examines the reason of the thing. I take the reason why a latter will revokes a former, is not because it contains words of revocation, or matters inconsistent; if that had been so, these books would have said so; but I take the reason why a latter will destroys the former, is this, from the very nature of a will as such an instrument. For a man having power of altering his will, as long as he lives, either in part or in the whole, when he makes and declares a new will, that will must be presumed to contain his whole mind concerning the disposition of his estate, and therefore that alone shall argue thus much. The words of declaring his will import it, for the words are these, "this is my last will and testament;" that excludes all others, it is an exclusive term. When a man has made his will, if a man would alter a part of it, there is a proper instrument for that, which is a codicil; but this is an instrument as well known in law, and as much use made of it almost, as there is of a will; for most wills of considerable matters have codicils now annexed, and this is so far from revoking, that it confirms the other will, and amounts to a new publication. Now, when a man has such an easy way to revoke part of it, or make alteration in his will, and he makes and declares a new will, and will not go by way of codicil, but makes a new will, I think this is a sign next to demonstration, that he designs

none of his former will shall stand. MY * LORD, if your lordship should intend this last will to stand with the former, and to be but some slight alteration or confirmation of it, you would confound the use of wills and codicils wholly, whereas there is not more difference between any two instruments in the law, than there is between these of a will and a codicil. The very making of them does import such an absolute difference. When a man delivers his will, he says, "I deliver this as my last will:" when he comes to make a codicil, that implies the contrary, that it shall not be his whole will; and therefore as to that he annexes it to his will, to shew that that as well as the other should stand. It is said in *the civil law*, a man can die but with one will. (I will agree my brother's distinction.) It is true, he can have but one will, but he may have twenty codicils; the reason is, because a will is presumed to contain the whole, and the codicil the contrary; and so it is said in *Swinbourn*. But, now MY LORD, as my brother says, I will agree, that a man may make partial wills of as many things as he has. He may make a will of his goods and chattels; and he may make a will of the manor of *Dale*, and the manor of *Sale*, and all stand together; but then your lordship will please to take it with this consideration, they must be declared to be particular wills at the same time. Now, if a man make a will of *Dale*, and afterwards of *Sale*, these are but pieces of one will, though written in several papers, and contain his whole will; but then he must come and declare not generally, that he made *ultimam voluntatem*, but *ult' voluntat.* of such a manor, and I have seen it in practice myself, where they have made a particular will of one thing alone; but when it is found generally that he made "*al' testamentum*," that is, a general testament, that is a will of all. My brother MAYNARD cited a case, 2 *Rich. 3. fo. 3.* and he takes it to be a judgment in point for him. Under favour, I take it to be clear against him. The book is as he has cited it. There was an action of trespass brought for goods, and the defendant made title to the goods by will of the deceased, by which he had made him executor; the plaintiff replies and says, he made "*al' testamentum*" and made him executor, and so he claimed the goods; the exception was taken; Ay, but you should have traversed the first will; No, say they (these the words are) "*quia per ultimum testamentum ut placitatur generaliter primum testamentum revocatur in omnibus.*" Now if they had not taken it that the latter will did revoke the first, it had been necessary for them to have traversed it. But then says my brother MAYNARD, he sets himself forth executor, and there was great reason for it in that case. He was plaintiff; and it was not enough * for him to avoid the other's title, unless he had entitled himself to the goods as executor; for if he had made himself no title, he being out of possession, he should have had no judgment, and therefore the setting himself forth to be executor, was not for avoiding the first will, but to make himself a title. MY LORD, here is one case will go a great way in the proof of this. If a man make twenty codicils, they may all stand together. If a man make twenty codicils, and it do not appear what date they are of, they

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3 Com. Dig. 4.

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shall all stand together. (q) But if he make two wills, and there is no date to them, and you cannot tell which is the first, and which is last, they shall be both void. (r) What is the reason? The reason is, because by making the latter, the first is gone; and though they cannot tell which of them is the latter, yet one of them must be the latter; therefore, rather than this rule shall be broke, that a latter will shall not revoke a former, they will adjudge both to be void. MY LORD, as to the rule that *Littleton* gives, and my brother has cited, where a man makes diverse devises, or diverse wills, the last devise and will shall stand, and the other be void. Now this must be understood (says my brother) that he makes diverse wills, and diverse devises in those wills. He is putting a case of diverse wills and diverse devises. It is not said the last will must have a devise in it to revoke the former. Then to examine our case here with *Littleton's* rule, which has always obtained. *Sir Henry Killigrew* makes a will in 1644, and afterwards (says the verdict) he makes "*al' testamentum* in 1645," which must by the way be intended a compleat testament; for when they find he made "*ult. testamentum*," it must be implied so (s), that he made a compleat will, and so the pleading at all times is: therefore, here they find, he made another will: then, according to the rule in *Littleton*, that made in the year 1645 must stand, that in the year 1644 is void: then what becomes of their case? If *Sir Henry Killigrew* had made one or more codicils, that would not have revoked the will. It is plain he had a way to have made any alteration; but when he comes and makes a whole new will, then the former is gone. But says my brother MAYNARD, this (may be) was the same will over again. Then it was not "*al' testamentum*;" for if a man write the same will over in other paper, and do declare that to be his will, that is not "*aliud testamentum*," that is *idem testamentum*; for the *testamentum* is the thing contained, and not the paper. It is just as if a man were to make a duplicate of his will, still it is but one will; so that that cannot be intended in this case. Again, * how can this case be brought within the statute of wills? At the common law it is plain, there could be no devise of lands. Now comes the statute of 32 Hen. 8. c. 1; which makes lands deviseable; but how? by a man's last will and testament. So is 34 Hen. 8. c. 5. Now they would claim by a devise made in the will in the year 1644, and how can that be a last will and testament when he made "*al' testamentum*" in the year 1645? So the case stands before your lordship. Can any man say, that this is a devise contained in the last will of *Sir Henry Killigrew*, when the jury has found he made a latter? I take it, that the latter will is the proper instrument to convey this land by. But, say they, where do they shew the contents of it? And therefore they would have it signify nothing. Under favour, MY LORD, we do not need to shew the contents of it. We are in possession. If there be a will; to revoke the former, we are only to shew he made a second will.

(q) Swinb. 7.

(r) Shower's Parl. Cases, 147. 3 Mod.
208. Ld. Ch. B. Gilbert's Treatise on

Wills, published in Gilbert's Executions,
page 412.

(s) Swinb. page 1. section 44.

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The will does not belong to us; the law never compels a man to shew what is impossible for him to shew. As to what my brother says, that this may confirm or stand with the other will. If the law were so, that a second will and a first might be coupled together, and stand together, which I do absolutely deny, but suppose it might be so, that they might stand and make but one will, say they, it is true, here are two wills, but we will suppose that the first was confirmed by the last, or that the last contained no new matter, contrary to the first, and then we will lick it all well, now the matter is saved. This would be a might pretty device to disinherit an heir: but I hope this will not serve their turn. For it does appear by the books cited to your lordship, that the making of a second will revokes the former. Then if they would support it by any matter they would suggest, they ought to have shewed it to the jury, that it might have been found. Here is the making of a will found, but nothing of this appears. Would your lordship presume it? and why should your lordship presume this against us that are in possession? It is not by law to be admitted. We are now in the case of a special verdict, which (my brother MAYNARD does admit) can have no matter of fact added to it, and this they would have is plain matter of fact. They would have you admit that this last confirms the other will, when it does not appear. They would have you presume that it contains matter that will stand wholly with the former will, but how can you presume this? if there could be a presumption, it ought to be the best for us, we are heirs, and your lordship will not presume any thing to disinherit an heir; you will help him as much as you can. Then we are in possession, you will not presume any thing to dispossess us. We come before you to defend our inheritance. It is enough for us when you charge us with a former will, to say, he made another after that; and it does not concern us to shew what the matter of it is. MY LORD, they might have made use of this with a great deal of more reason, to a jury; they ought to have shewn the contents of the will to them, but they did not, and therefore you have no reason to presume it. For now that it is found there is a will, your lordship is bound up to it, and must take it that there was a compleat will made. MY LORD, the objection would have been more reasonable for them to have made, if, upon the face of the will, it appeared it did confirm the former, or his intention was that the former should have stood in part or in the whole, then there might have been more colour for them, as in the case of *Coward v. Marshal*. (1) My brother quotes the passage right, but not the book. That was in an action of trespass; a special verdict was found that A. by his will devised *Black Acre* to his son in fee, and married, and by another will devises the land to his wife for life, paying annually to his son and heir, twenty shillings; then the question was whether the latter was a revocation of the other *in toto* or not; and it was the opinion of ANDERSON and GLANVIL, that they might stand both together. But I take that to be another guess case than ours. It seems there, that it was not a formal testament, but a co-

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(1) Cro. Eliz. 721.

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vices, 18.

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dicil; and it is said to be by another writing, which I take was intended by them to be a codicil; and then according to what I told your lordship before, it does not revoke the whole will. But then, MY LORD, there is that which took with those judges, and that is, that upon the matter that appeared before them, they took it, not only to stand with it, but to be a confirmation of it, for there say they, his giving twenty shillings a year to his son, to whom he had given the reversion in fee before, seems that he intended his son should have the reversion in fee; and so this would stand with his former will, and be a confirmation of it. How far that might rationally be collected I will not dispute, but, however, they collecting it so, it was a reason to them, and they took it so; and that was the reason that ruled that case: so I take it the case will not stand in our way at all. My brother MAYNARD has made a great many objections in this case; but the chief I remark are these. FIRST, * He says there may be a will made of lands in *Yorkshire*, to one, and afterwards the party may come and make a will of his land in *Durham* to another, and they shall both stand; and, it seems, the case that he has put out of his own private notes is so. I agree the case to be good law, for that stands upon the rule of particular wills, and nobody will deny but a particular will may be made of one thing, and another of another thing, and one shall not revoke the other; but it does not come within the general rule, that a second will shall revoke the former. Now if it had been found in our case, that he had made another will of this land, there had been an end of the cause.—SECONDLY, In the case of 15 *Hen. 7. pl. 17.* he cites these words, “the Court must look upon the words of the “will.” It is true, they must if they are to give judgment for a thing contained in the will; but that comes nothing to our purpose, that the making of a second will revokes the former. His case of *Eyres v. Eyres* (u), will not come to our case at all. For there were legacies given to the brothers; and afterwards the testator being demanded, whether he would give his brothers any thing? No, says he, “I will give them nothing.” There the words were ambiguous; whether he meant he would give them nothing by the former will, or give them nothing then.—THIRDLY, My brother tells you, and he cites *Godolphin* 23, that a man cannot make two wills, unless it be of two things. I think this is against him, for then he cannot make two general wills, as these are found to be. It is clear against him. MY LORD, in this case my brother tells you that here is a kind of uncertainty in this finding; and, says he, you will not take our lands from us by an uncertainty. I must make him the same objection again; the lands are ours. If here be an uncertainty, you will not take it from us, why should your lordship take it from us upon an uncertainty to give it to him? the land is ours, you must take it away, or else we shall retain our land. MY LORD, I take it, these are the chief objections my brother has made. And, you do now find an heir in possession. It is found his ancestors made a will, and gave away his land; and it is found by the same verdict, that this

(u) Cro. Car. 51.

was not his last will, unless a man can say, a will made in the year 1644, be after * a will made in the year 1645, but if not, then I am sure it is found here was a latter will. Says my brother, the jury do not find, whether here is a revocation in *terminis*? I think they need not do that, but only shew a will that makes a revocation. All the finding of special verdicts is so. Would he have a jury find the matter of law? that must be left to your lordship. You find us in possession, and I hope you will not take away our land from us.

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LORD CHIEF JUSTICE. I have heard it argued before, but I cannot tell whether my brothers will ask for a second argument: I will not declare my opinion yet. But as to what my brother argues from uncertainty and possession, they had possession for twenty years upon the first will; and for the uncertainty there is nothing of it in that will. He gives it to *Mrs. Berkley* for life, and afterwards to *Henry Killigrew*, and they come and took the possession, and were in possession a great while; and then you came and contended it, and got a verdict; and here they bring another action, upon which this special verdict is found, that *Sir H. Killigrew* made "*aliud testamentum*."

PEMBERTON *Serjeant*. They were in by *extents*.

HOLT *Serjeant*. We could not come to it for that.

LORD CHIEF JUSTICE. And then the two wills may stand together. There are other cases; there is one case of *Herne v. Allen*.

* PEMBERTON *Serjeant*. I take it, the question will be, whether upon this general finding of "*aliud testamentum*;" your lordship shall presume it to be a will that will stand with the former will, or revoke it.

* [555]

LORD CHIEF JUSTICE. We can neither fancy that it may stand with it, or that it is contrary to it; and therefore the *aliud* must be thrown out.

[THE COURT, in Trinity Term, 4 William and Mary, gave JUDGMENT for the plaintiff.

A WRIT OF ERROR in parliament was brought upon this judgment, and now it was argued that this last will could not be taken to be a duplicate of the former, but must be deemed a revocation; that no will is good but the last; that every will is revokable till death; that the making of another, doth import a revocation of all former ones, though it be not so expressly declared in writing, for it must be the last, or nothing; that this conveyance by will was anciently a privilege by the civil law, for people in *extremis*, who had not the time or assistance necessary to make a formal alienation, and chiefly intended for military men, who were always supposed to be under those circumstances, and therefore the ceremonies and number of witnesses required of others were dispensed with, as to

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soldiers;

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soldiers; but now the rules for military testaments, as they are called, are allowed in most cases; that as to lands, by our law, was a privilege only given to some boroughs and places within the kingdom; and particular custom gave the liberty of disposing lands or houses by will, and that by nuncupative will or parol without writing; so is *Bracton*, lib. 4. fol. 272. *Fleta*, lib. 5. cap. 5. *Potest legari et catallum tam hereditas quam perquisitum per barones London et burgenfes* Oxon, 1 *Inst.* 111. that then came the statute of *Hen. 8.* and impowers a devise by a man's last will and testament in writing; but still it is by his last will. And so is *Littleton*, sect. 168. If divers wills, the latter shall stand, and the others are void, 1 *Inst.* 112. In truth it is plain law, the first grant and the last testament. In *Swinb.* 1 part, sect. 5. p. 14. no man can die with two wills, but he may with divers codicils; and the latter does not hinder the former, so long as they be not contrary. Another difference there is between wills and codicils: if two testaments be found, and it cannot be known, which is first or last, both are void; but the latter countermands the first, though there be a clause in the first, that it shall not be revoked, and though an oath were taken not to revoke; because the law is so, that the very making of a latter revokes the former: so is *Linwood's Provincial de Testamentis*; justice *Dodderidge's Office of Executor*, published by *Wentworth*, 29. A verbal will revokes a former written will, *Forse v. Hembling*, 4 Co. 60, 61. *Plowd.* 541. *Perkins*, sect. 178, 179. and sect. 478. The 2 *Hen.* 5. 8. is full to this purpose. There is an action by an executor against two executors, and they plead a testament whereby they are made executors; and the plaintiff replies, that he afterwards made another and himself executor; and held that by the second the first became void. Now the meaning of these books cannot be, that a will expressly revoking, is the only will that can make a revocation; nor is it, that a contrariety or repugnance between the one and the other is necessary to make a revocation; for though there be no new will made, yet a revocation may be by word of mouth, as *Cro. Jac.* 49. 115. *Cro. Car.* 51. *Cro. Eliz.* 781. nay, a void bequest shall revoke a will, so shall a deed that has no effect, as feoffment without livery, a devise to *J. S.* or to a corporation, when there is no such, will do it; so that it is not the contradiction between the disposal which revokes, for that which is no disposition at all will do it. The meaning of the authors cited therefore is somewhat else; and it can only be this, that there is somewhat particular in a will, to that instrument of conveyance, more than to any other, that even the making of a new will is sufficient revocation; the words are plain, by the making a new will the former are all destroyed, for there can be but one last. And when a man makes and declares a new will that new will must be presumed to contain his whole mind concerning the disposition of his estate: declaring his will imports thus much, and excludes all other. When a man would alter part of his will, there is a proper instrument for it, called a codicil, which is known in the law as well as that of a will: here is nothing found of a reference to the former. To judge it otherwise, would confound the use of wills and codicils, and the difference between them. It is true, that a
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man may make partial wills of several parts of his estate, and all may stand together; but then they must be declared to be wills concerning particular things; and they are but several pieces of the same will, though written in different papers: but then in pleading one of them, you must not generally say he made *ult' voluntatem*, but *ultimam voluntat'* of such a thing: but here it is *aliud testamentum*, i. e. a general testament. The 2 Rich. 3. fol. 3. is directly thus, the defendant pleads one will, the plaintiff replies another, and exception taken, because he did not traverse the former, but held needless to do so, *quia per ult' testamentum ut placitatur generaliter, primum testamentum revocatur in omnibus*: and it cannot be pretended, that this might be the same will written over again; for if so, it could not be *aliud*, it would be *the same*: these are not quibbles upon words; for can it be said, that this is a devise by the last will of Sir H. when there is another: nor is it an objection, that the contents do not appear; for the will belongs not to the heir to keep, and consequently not to shew; in pleading he is not bound to a *profert*; it is enough that there was a subsequent will. And as the latter may confirm or be consistent with the former, so it may not be so; and the consistence is not to be presumed, especially against an heir at law, and in possession. In the case of *Coward v. Marshall, Cro. Eliz. 721.* the substance of both are declared, and thereby they appeared to be consistent, and consequently no revocation: here *eadem mens sic testandi*, the same intent of disposing his estate the same way, can never be thought to continue, for then there had been no occasion of making another will. If this be not a revocation, it is an act void, and to no purpose, which is never to be intended.—Then it was insisted on, that the bare act of making and publishing another will, is a revocation, and the finding of the contents unknown is void: if this be not a will, it is a codicil, and that is contrary to the finding of the jury; for the verdict mentions a second substantive independent will, without reference to the former; which second will is a revocation: and therefore it was prayed that the judgment should be reversed.

It was argued on the other side, in behalf of Mr. *Nesworthy*, that this was no revocation; that here had been a great stir about nothing, for that nothing appeared against his title; that a man may make a will of several things at several times, and they both shall stand; that a deliberate will being made, the contents whereof are known, shall never be revoked by that which is not known: nothing can be judged upon that which doth not appear, and consequently it can never be judged to be a revocation: here is another will, and nothing is given by it, nothing is found to be given by this subsequent will. The form of entering the ancient judgments was, *quibus visis lectis et auditis et per Curiam plene intellectis*, now what is here read to make a revocation. 2 Rich. 3. fol. 3. is with the judgment, for there it is replied that he made another executor; there are the contents pleaded, sufficient to maintain his count, and answer the defendant's bar; the book is *per hoc quod alius executor nominatur*. Then was cited *Cro. Car. 51.* the reason given is, *quia in dubiis non presumitur pro testamento*, and here being a good will, at the most the

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other is doubtful. *Cro. Car.* 114, 115. Several wills of several things may be made. And the same book 595. 10 *Car.* 1. which resolution serjeant *Maynard* in arguing this case below, said that he heard in that court of *King's Bench*: it is the subject matter of the wills and the repugnancy which makes the revocation. In this very case in the *Exchequer*, upon an *English* bill, it was held by *HALE* to be no revocation, it is in *Hardres* 375. *Coke* upon *Littleton*, which has been quoted, comments upon these words *several devises*, and if there be no devise in the second, there can be no sense or meaning in it, and consequently unless some meaning appear, it can never be an evidence of a change of his mind; as it might be a revocation, so it might be otherwise; and he that will have it to be a revocation, must prove it to be such: no man can affirm that every will must necessarily be a revocation of a former, for the second will might be of another thing, as goods, or of another parcel of land, or in confirmation of the former. If in these, and many other like cases, a latter will is no revocation of a former, how can it possibly with justice be concluded, that a latter will without contents, purport, or effect, shall be a revocation of a former. And though the jury have in this case believed the witnesses, and found that *another will* was made, it may be of dangerous consequence to encourage and construe this a revocation, without knowing the contents; for no will can be secure against the swearing of a new will, if there be no necessity of shewing it, or proving what it was.]

For which, and other reasons, it was prayed that the judgment might be affirmed; and it was affirmed. (x)

(x) In the case of *Relfe v. Harwood*, Hilary Term, 14 *Geo.* 3. in C. B. a special verdict was found, that *John Lacy*, the testator, duly made a will in the year 1743, and that in the year 1756, the said *John Lacy* did duly make and publish another will and testament in writing in the presence of three subscribing witnesses, who duly attested the same; and that the disposition made by the will in 1756, was different from the disposition by the will in 1743, but in what particulars was unknown to the jurors; but they did not find that the testator cancelled the will of 1756, or that the defendant had destroyed the same, but what was become of the said will they were ignorant, &c. *DE GREY* Chief Jus-

tice, *NARES* and *GORD* Justices, were of opinion *contra* *BLACKSTONE* Justice, that the latter will being found to be different from the former one was a REVOCATION of it. 3 *Will.* 497 to 516; but in *Mich. Term*, 15 *Geo.* 3. on a writ of error to the *King's Bench*, THE JUDGES of that court were unanimously of opinion that it was not a revocation, *S. C.* 2 *Black. Rep.* 937. *S. C.* *Cowp.* 87. and on appeal to the House of Lords, where the opinion of the twelve judges was taken, the judgment of the *King's Bench* was affirmed, 7 *Brown's Cases in Parliament*, 352. See also the Year Book, 2 *Rich.* 3. pl. 3. *Powell on Devises*, 540. 3 *Atk.* 552. 1 *Vezey*, 32. *Dougl.* 40. *Cowp.* 49.

A R G U M E N T

ON THE

CASE OF A CLERK OF THE PEACE.

ON

STATUTE, 1 WILLIAM & MARY.

Harcourt against Fox.

MR. ATTORNEY GENERAL. When a clerk of the peace is nominated and appointed by the *custos rotulorum*, &c. he is to hold his office *quamdiu se bene gesserit*, that is, during life, unless he forfeits it by misdemeanour; and his office is not determinable at the will, or by the death, or displacing of the *custos rotulorum*. This appears,—FIRST, From the words of the statute 1 William and Mary, c. 1. It says “the *custos rotulorum*, or other, having right to “nominate a clerk of the peace, shall nominate and appoint a fit “person for the same.” For what time or limitation? During his pleasure, or his continuing *custos rotulorum*? No, but for so long time as such clerk of the peace shall well demean himself in his office, and in case he shall misdemean himself it provides a special way for discharging him, *viz.* by examination and proof before the quarter sessions. Now • all that is allowed to the *custos rotulorum*, is the nominating the person; the interest or estate he is to have in the office is limited and fixed by the act of parliament, *viz.* during his good demeanour. When an office is granted *quamdiu se bene gesserit*, it is a freehold, and to last during the parties life. It is so, even in the case of THE KING, whose grant shall be taken most strictly against himself. If the king grant an office *quamdiu se bene gesserit*, it is a freehold for life. 3 Aff. 4. pl. 9.—SECONDLY, From the intent of the act, which seems to be to establish THE CLERK so as that

A *custos rotulorum* cannot appoint a clerk of the peace for years, or durante bene placito, but by 1 William and Mary, c. 21. it must be for life, *quamdiu se bene gesserit*.
S. C. Ante, 428.
506. 516.
4 Com. Dig. 154.

that he should depend for his place on his own good demeanour and not on the arbitrary will of the *castratarius*. And this is the condition, limitation, and provision, which the act speaks of. By this a clerk of the peace would be encouraged to perfect himself in the skill and business of his place, and to do his duty, and to recommend himself to the good opinion of the court of sessions to whom he is attendant; whereas otherwise his care and study might be to recommend himself to the opinion of the *castratarius* upon whose will his place depended. Also by depending on will, it might be in the power of the *castratarius* to keep the clerk under constant pension. And it would be a great temptation and occasion upon the change of every *castratarius*, or the change of his mind, for the clerk to buy his place a-new, and be an occasion of that corruption which the act chiefly intended to prevent. The act requires, "that the *castratarius* shall not take any money, bond, assurance, &c. for nominating and appointing the clerk," and the clerk is to "swear that he has not paid, nor will pay any money, nor has given bond or assurance for such nomination or appointment." By which it appears the parliament intended that the nomination or appointment did confer a stable interest in the office during life, and therefore their great care was to prevent giving or promising any thing for the nomination or appointment. Whereas * if the clerk might be appointed to hold at will, this care and provision were vain; for the *castratarius* may take nothing for nominating and appointing, and the clerk might swear he had not given or promised any thing, and the next day after the *castratarius* might turn him out, unless (for his continuing) he would give him such money, &c. and thereby the great intent of the act would be eluded.

* [558]

P E T I T I O N

O F

The PRIOR OF LANTHON'.

Rot. Parl. anno 8 Hen. 6. Memb. ult. num. 70.

A PETITION concerning an erroneous judgment given in the parliament of Ireland, upon a WRIT OF ERROR there brought certified into the King's Bench in England, which had no power to receive it as the petition suggested, and therefore prayed it might be removed into the parliament and Lord's House in England to redress it.

AU roy nostre tresouveraigne seigneur et a les seigneurs espirituelx et temporelx de cest present parlement', supplie humblement JOHN PEN-BRYGGE priour de Lanthon' primes en gales que come en les record et processe et en rendre de juggement de le plee que fuist en votre parlement tenus a DEVELYN en votre terre DIRELAND devant JAMES BOTTILER counte de Urmond nadgairs votre justice en mesme votre terre del assent des seigneurs espirituelx et temporelx illeonges adonques esteantz sans brief bille ou petition originall perentre le priour de meafon dieu de Mollynger et William nadgairs PRIOUR DE LANTHON' susdit de le plee que fuist devant vous nostre souveraigne seigneur en votre dite terre perentre le dit priour de meafon dieu de Mollynger et le dit nadgairs PRIOUR DE LANTHON' per vostre brief de erreur quel en record et processe et auxi en le rendre de juggement de le plee que fuist devant JOHN FITZ ADAM et ses compaignons nadgairs justic' de fire, * HENRY nadgairs roy d'Engleterre votre aiel de son bank en mesme le terre per brief de mesme votre aiel entre le dit nadgairs PRIOUR du dit lieu de LANTHON' predecessour du dit ore PRIOUR DE LANTHON' et le nadgairs priours de dit meafon dieu de MOLLYNGER predecessour de dit ore priour de meafon dieu de MOLLYNGER de xvii. xviii. les queux a dit nadgairs PRIOUR DE LANTHON' furent adereres d'un annuel rent xiii. vi. viii d. le quel le dit nadgairs PRIOUR DE LANTHON' de dit nadgairs priour de meafon dieu de MOLLYNGER demaunda de la querell de mesme le priour de meafon dieu de MOLLYNGER nadgairs recenstes davoit intervenu

Cro. Car. 511.
2 Bulst. 163.
3 Com. Dig.
531.

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intervenu si aucun i fufe a corriger le quel jugement devant les ditz nadgairs justic^z de bank renduz devant vous^zon vostre dite terre fuisse affirme erreur overte enterment a grand damage du dit suppliant : de quel plee en le dite vostre parlement eive le record et processe devant vous en votre chancellor^z d'Engleterre par certains causes nadgairs per vostre brief que issist hors de vostre chancellor^z d'Engleterre a vostre chancellor^z Dyreland direct fustes venir^z et les queux ore en votre court devant vous en votre bank en Engleterre remaignant al suite de dit suppliant a cause que le erreur susdit ne poet mye illonges estre termine ne discusse a cause que les justices as plee^s a tenir devant vous en vostre dit bank en Engleterre nount my poiar de determiner ne de adjudger per la loy ceo que fuisse fait en votre dit parlement Dyreland plese a votre hautesse de commander WILLIAM CHEYNE chivaller votre chief justice as plee^s devant vous tressoveraigne seigneur a tenir assigne de faire venire en cest present parlement les ditz record et proces^s du dit plee^s vos toutz choses eux touchantz devant vous tressoveraigne seigneur et les seigneurs susditz ensy que venez les ditz recorde et processe en mesme cest present parlement droit soit fait en les premisses solonque la ley et custum de votre roialme d'Engleterre et ceo pur dieu et en overe de charitee.

A T A B L E

O F T H E

P R I N C I P A L M A T T E R S C O N T A I N E D I N T H I S B O O K.

ABATEMENT.

Vide Partowners 1.

Exception 2.

Death.

- | | |
|---|--|
| <p>1. A Plea beginning in <i>abatement</i>, and concluding in <i>bar</i>, is a plea in bar; and <i>è contra</i>, a plea beginning in <i>bar</i>, and concluding in <i>abatement</i>, is a plea in abatement 4</p> <p>2. In trespasss against two: <i>quare</i>, if they can join in pleading in abatement, an action depending for the same trespasss against one — 75</p> <p>3. Several outlawries pleaded in abatement bad; for duplicity is not allowed either in <i>abatement</i> or in <i>bar</i> — — 80</p> <p>4. A plea in abatement, to debt on a judgment, that a writ of error is depending, is bad — — 98</p> <p style="padding-left: 20px;">Same point — — 146</p> <p>5. In <i>assumpsit</i> for money had and received, the defendant pleaded in abatement an attainer; the plaintiff replies a pardon, and concluded in bar <i>petit judicium et damna sua</i>, and held to be a discontinuance — 155</p> <p>6. "<i>Alien nec</i>" pleaded with a full defence; and the Court inclined that it was ill pleaded — 349</p> | <p>7. Held well enough without saying <i>de patre et matre</i> — — 349</p> <p>8. A plea in abatement for <i>misnomer</i>, though the names are different, is ill, if he say, <i>et præd' J. Sc.</i> and do not say, <i>et præd. J. J. vers' quem billa præd' Sc. venit et dicit</i>; and though the precedents in <i>Thompson</i> are as above — — 394</p> <p>9. What names are different — <i>ib.</i></p> <p>10. Where a plaintiff in <i>replevin</i> may plead in abatement as well as when he makes confuſance — — 169</p> <p>11. For matters in and before the writ, if not pleaded in abatement, no advantage can be taken of it by error; but otherwise where it is after the writ — — 169</p> <p>12. If an infant avow, and appear by attorney, it is pleadable in abatement, but not assignable for error — — 170</p> <p>13. A writ of error is not abated by the death of the defendant, where error depending is pleaded by the survivor to a <i>scire facias</i> brought on a judgment recovered — 186</p> <p>14. That it is no abatement if both die; for a <i>scire facias</i> may be sued against the executors, and they made parties — — 187</p> |
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2. On a devise of lands to two, if one die before the testator, the whole survives to the other — — 91
3. What words in a will seem to carry a fee simple — — — 348

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5. In ejectment if a special verdict find that A. being seised of lands in fee, in the year 1644 devised the same to B. for life, with remainder to C. in tail, &c. "and that afterwards in the year 1645 the said testator made *another will* in writing, but what was contained "in the said last mentioned will the "jurors are ignorant;" the *second* will so found does not amount to a REVOCATION of the *first will* 537

So where a special verdict was found that A. duly made a will in the year 1748, and then in 1756 he made *another will*, and that the disposition made by the will in 1756 was *different from* the disposition made by the will in 1748, but in what particular the jurors are ignorant, this second will is not a revocation of the former will — 555.

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I N D E X.

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ERRATA et ADDENDA.

- Page 14, after " 816," last line, note (c) add " and the case of Smith
" assignee of Clerk v. Mills, 1 Term Rep. 475."
- 43, after " 1 Term Rep. 93. 446," add " 2 H. Bl. Rep. 10."
- 46, case 42, margin, add " S. C: 5 Mod. 459."
- 65, last line, add " See the case of Ellis v. Smith. F. Vezey's
" Rep. 11."
- 182, line 24, margin, read " a record," instead of " in a record,
" &c."
- 138, to note (d), add " 2 Shower, 232."
- 141, note (a), second column, line 9, instead of " Cowp. 12,"
read " Cowp. 72."
- 144, note (a), instead of " Tardley v. Roe," read " Yardley v.
" Roe."
- 168, line 6, transpose " Cowp. 424," into the margin.
- 247, margin, last reference, dele " S. C."
- 303, margin, line 6, instead of " while," read " where."













